

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF RHODE ISLAND

3 YARON UNGAR, et al

C.A. NO. 00-105 L

4 Plaintiffs

5
6 V

7 THE PALESTINIAN
8 AUTHORITY, et al

DECEMBER 3, 2010
PROVIDENCE, RI

9 Defendants

10
11 BEFORE: MAGISTRATE JUDGE DAVID L. MARTIN
12

13 APPEARANCES:

14
15 FOR THE PLAINTIFFS:

DAVID J. STRACHMAN, Esq.
321 S. Main St.
Suite 400
Providence, RI 02903
351-7700

18 MAX WISTOW, Esq.
19 61 Weybosset St.
Providence, RI 02903
20 831-2700

21
22 FOR THE DEFENDANTS:

BRIAN A. HILL, Esq.
655 Fifteenth St., NW
Suite 900
Washington, DC 20005
202-626-5800
24
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1 DECEMBER 3, 2010

2 THE COURT: This is the matter of the estate of
3 Yaron Ungar, et al vs The Palestinian Authority, et al,
4 Civil Action No. 00-105 L. There are three motions
5 scheduled for hearing in this matter this morning.
6 Those three motions bear the document numbers 572, 583
7 and 604. The Court intends to take the motions up in
8 the order in which I've just announced them. The
9 attorneys will identify themselves, please.

10 MR. WISTOW: Max Wistow for the plaintiffs.

11 MR. STRACHMAN: David Strachman for the
12 plaintiffs.

13 MR. HILL: Good morning, your Honor. Brian Hill
14 for the defendants.

15 MR. SHERMAN: Deming Sherman for the defendants.

16 THE COURT: Thank you, Counsel. All right, the
17 first motion that we're going to take up is document
18 number 572, the title of which is defendant The
19 Palestinian Authority's motion to compel answers to
20 defendant's interrogatories numbers 19 to 21, and
21 responses to defendants' request for production numbers
22 23, 25, 26 and 29 to 35.

23 All right, Mr. Hill, I'll hear you, sir.

24 MR. HILL: Hello again, your Honor. Good
25 morning.

1 THE COURT: Good morning.

2 MR. HILL: Let me start by making a preparatory
3 remark which is discovery is now closed, and so we're in
4 the unusual posture of asking you to compel answers to
5 interrogatories and production of documents at a point
6 in time when we're unable to do any further discovery
7 based on any production the Court may order.

8 I would also note for the Court, as you may have
9 seen in the docket, that on Monday we separately moved
10 to exclude from evidence at the January hearing any
11 witnesses who have not been identified before the close
12 of discovery, any experts for whom we have not received
13 expert disclosures, any experts for whom we have not had
14 the opportunity to take a deposition, and any documents
15 that have not been produced. So this motion may have
16 been overtaken by that subsequent motion of the
17 defendants.

18 THE COURT: I'm going to just interrupt,
19 Mr. Hill, on that point. The Court had earlier
20 indicated that it would hear this motion on an earlier
21 date. When that date came, it had to be rescheduled
22 because I was ill, I simply want to place that on the
23 record. My recollection was that we had a chambers
24 conference about scheduling. You indicated the
25 defendants were eager to have the Court address this

1 motion, and were asking to have the Court rule on the
2 motion on the papers without a hearing, and that counsel
3 for the plaintiffs, I think it was Mr. Strachman,
4 indicated that the plaintiffs would like the opportunity
5 to have a hearing and be heard on the motion, and in
6 response to that request, the Court said, all right, it
7 would place the matter down for hearing. I forget the
8 exact date but I'm sure the record reflects it, and on
9 that date regrettably I was ill and, therefore, the
10 motion had to be rescheduled. I believe it was
11 initially rescheduled, I think to Tuesday --

12 MR. HILL: This past Wednesday.

13 THE COURT: This past Wednesday.

14 MR. HILL: Yes, your Honor.

15 THE COURT: And then my clerk received word from
16 Mr. Sherman asking if the motion could be placed on
17 today's calendar with the other two motions that were
18 scheduled for hearing, and my response was that was
19 agreeable with the Court. I had only put it down for
20 Wednesday in response to my understanding that
21 defendants were eager to have it heard as soon as
22 possible. I understand that I may have concluded that
23 two days didn't make a lot of difference and you'd like
24 the opportunity to be here in person. In any event, I
25 did move it from Wednesday to Friday. But I felt I

1 wanted to put on the record how it came to be that this
2 motion is being heard on December 3rd and not earlier,
3 given the fact that the Court had indicated it would
4 hear it on an earlier date. All right, you can --

5 MR. HILL: Your Honor, I agree with everything
6 you've said and, in fact, the rationale for us asking to
7 move it from Wednesday to today is precisely as your
8 Honor said, just to avoid a second trip up here.

9 So having said that as a predicate, let me make
10 clear for the record that the relief defendants are
11 primarily seeking is the motion to exclude which was
12 filed on Monday, and I understand that has not been
13 referred to your Honor, and it's not before you today.
14 So what your Honor is left to do then is do something
15 with this motion in light of the fact that it may be
16 mooted if the Court subsequently grants the motion to
17 preclude. And I'm happy to address it with that
18 understanding and that caveat.

19 THE COURT: I want to be sure I understand what
20 you're saying, Mr. Hill.

21 MR. HILL: Yes, your Honor.

22 THE COURT: What you're saying is if the motion
23 to exclude is granted, it moots the motion here.

24 MR. HILL: It would moot it in substantial part.
25 For example, I don't need to know any other witnesses

1 that are not going to be called at the hearing. I don't
2 need any further expert disclosures on experts that are
3 not going to testify at the hearing. I believe I was
4 entitled to that discovery during the discovery during
5 the discovery period and for the reasons your Honor just
6 articulated we didn't get a ruling in time for us to do
7 anything about it. So our principal relief would be
8 that these people would not be allowed to testify at the
9 hearing, and that any documents that haven't been
10 produced to us before the close of discovery wouldn't be
11 utilized.

12 THE COURT: When you say "these people", which
13 people?

14 MR. HILL: The ten expert witnesses that
15 plaintiffs have thus far disclosed and any further
16 witnesses that they would disclose in response to an
17 order from the Court requiring the compulsion. So
18 here's what I would suggest. I would suggest it's
19 proper for the motion to be granted with the
20 understanding that I'm not waiving my argument that
21 these people should be precluded in any event because
22 they weren't given to us in time to do discovery.

23 THE COURT: Why don't you make your argument on
24 this motion then.

25 MR. HILL: Thank you, your Honor. So the issue

1 appears to be then what the Court intended when it
2 entered the June 1st order allowing discovery in this
3 case, and I think it's worth quoting the order, which is
4 document 489 in the record. This is the Court's June
5 1st, 2010 order entered by Judge Lagueux, which says:
6 "Pursuant to Rule 16 of the Federal Rules of Civil
7 Procedure, it is ordered that all pre-hearing discovery
8 be completed by November 19, 2010." The Court further
9 orders that counsel present the following by December
10 17th, 2010, a typewritten memorandum, and then there is
11 a description of what the memorandum will include, a
12 list of exhibits intended to be offered, and there's
13 some details about how those have to be disclosed, a
14 list of all witnesses indicating those to testify as
15 experts, probable length of evidentiary hearing, any
16 additional matter which counsel feels will aid the Court
17 in the disposition of the hearing of said action, and
18 then it says an evidentiary hearing will be held on
19 January 18th. And paragraph 9, of the order says,
20 failure to strictly comply with this order will result
21 in appropriate sanctions which may include dismissal or
22 default. So there's nothing in the order which says the
23 defendants cannot discover the identity of witnesses
24 that the plaintiff will call at the hearing. There's
25 nothing in the order that says the defendants cannot

1 discover opinions that experts called by the plaintiffs
2 may offer, or the bases for those opinions, and there's
3 nothing in the order that says defendants cannot
4 discover the identity of the exhibits the plaintiffs may
5 offer at the hearing in January. The plaintiffs,
6 however, have taken the position that because of the
7 procedural posture of the case, which is, as the Court
8 knows, on a motion to vacate an existing judgment the
9 normal rules of civil procedure and the disclosure
10 requirements of Rule 26, in particular, don't apply, and
11 because the Court has required a memorandum on December
12 17th that requires disclosure of certain things to the
13 Court, that therefore the defendants can't discover that
14 material beforehand. And I would suggest two things.
15 First of all, the argument about whether Rule 26
16 technically applies or doesn't is not relevant to this
17 particular motion. It will be to one we talk about
18 later today I suppose. But secondly, there's nothing in
19 the Court's order that says you can't discover who your
20 opponent is going to call at a hearing. In fact, I
21 would suggest that that is one of the very basic things
22 that civil discovery allows so you can find out who the
23 witnesses are and then depose them so that when you get
24 to a hearing you know what they're going to say and you
25 can efficiently cross-examine them. Same thing with

1 experts, there's nothing in this order that says we
2 can't find out what their expert opinions are and what
3 the bases for them are. There's nothing in the order
4 that says we can't discover what their exhibits are.
5 And so I would respectfully suggest that the motion to
6 compel should be granted with the caveat I gave earlier
7 that I don't mean to waive the preclusion argument,
8 which was made in a separate pending motion.

9 Let me address the second part of the motion
10 which goes to discovery related to damages. We have
11 also propounded an interrogatory, which is interrogatory
12 number 21, asking the plaintiffs if they contend that
13 the amount of damages that were previously entered by
14 the Court in the default judgment would withstand
15 adversarial testing in this matter, and they have
16 answered that interrogatory in part and said, yes, they
17 believe it will. And they have provided us with some of
18 the bases for that assertion. We would respectfully ask
19 that the Court enter an order requiring them to give us
20 a full and complete answer to that interrogatory that
21 tells us the full bases for their contention that the
22 amount of damages and the default judgment will
23 withstand adversarial testing.

24 We have also asked for certain documents relevant
25 to the amount of damages, and these documents fall into

1 roughly two categories. Documents related to the claim
2 by the plaintiff that the minor plaintiffs, the children
3 of Mr. Ungar, have suffered mental injuries as a result
4 of their father's death, and these are categorically any
5 mental health records, any medical records, and
6 preschool or school records.

7 THE COURT: Mr. Hill, that I recall you argue in
8 your memorandum that because the Court found that the
9 two children would suffer mental illness in the future
10 you're entitled to this discovery, and the Court found
11 that the children would suffer mental anguish. Is it
12 your contention that mental anguish is mental illness?

13 MR. HILL: Well, your Honor was here in 2002 at
14 that hearing, I was not, but you did hear expert
15 testimony from Dr. Alan Brenman who opined that the
16 children were, among other things, more susceptible to
17 suffer from mental illness in the future because of
18 their father's death and so -- and I believe that your
19 Honor specifically referenced that testimony in the
20 Report and Recommendation that was subsequently adopted
21 by Judge Lagueux as the basis for the damage award in
22 this case. And so I think, therefore, whether or not
23 these minor plaintiffs have manifested mental illness is
24 relevant to the reliability of Dr. Brenman's testimony
25 that they were more likely to do so. And we have, in

1 fact, submitted an expert report from our own expert
2 Dr. Eileen Ryan who has said that she does not believe
3 that Dr. Brenman had an adequate basis, did an adequate
4 methodological exam of the minor plaintiffs to draw the
5 conclusions that he then offered to the Court and which
6 I respectfully submit the Court then took and relied
7 upon in rendering the amount of damages that were made
8 by the plaintiffs in this case. As the Court recalls
9 was, I believe, \$10 million per child before trebling.
10 So it's a substantial award for people that are
11 obviously -- I don't mean to minimize the fact that
12 these children lost their father, but whether or not the
13 amount of that award is able to withstand adversarial
14 testing will involve, I think, fairly an inquiry of
15 whether those minor plaintiffs have suffered any mental
16 illness as a result of their father's premature death.
17 And the admissibility of Dr. Brenman's testimony will,
18 in part, turn on whether or not under Daubert he did an
19 adequate examination such that he had an adequate
20 methodology to render the opinions that he gave to the
21 Court and how much the Court relied at the time.

22 So I would submit that this is relevant for that
23 purpose. And it would be relevant, incidentally,
24 whether or not we are talking about additional material
25 beyond what was given to the Court in 2002, as you may

1 recall from the October argument when Mr. Rochon was
2 talking about the need for mental examinations. Our
3 position is that the \$116 million will not withstand
4 adversarial testing, and we intend to demonstrate that
5 through, among other things, expert testimony that shows
6 those amounts are respectfully too much for the damages
7 that were demonstrated to the Court in July of 2002.
8 That will include inquiry about whether the expert
9 testimony that the plaintiffs presented and how much the
10 Court relied was admissible and otherwise appropriate
11 under the Daubert standard. So these materials will
12 inform those decisions, and will inform the argument
13 about whether or not as a matter of fact those amounts
14 are appropriate. So I would submit that they are
15 relevant and we ought to get them even at this point in
16 the case.

17 THE COURT: You may continue or conclude. It's
18 your pleasure.

19 MR. HILL: I just wanted to make sure I wasn't
20 interrupting a forth coming question from the Court.

21 The other category is related in terms of the
22 theory of relevance, and it is materials related to the
23 death of Mr. Ungar. So these are the autopsy materials,
24 the police reports, photographs of the crime scene, some
25 of which we have and some of which were in the record in

1 July of 2002. We're just asking that we get all of that
2 material so our own forensic pathologist can examine
3 that material and have the best bases possible for
4 opining about the reliability of the testimony the Court
5 took from Dr. Friedman in July of 2002 who, as the Court
6 may recall, was not a forensic pathologist. And I note
7 in this regard that the plaintiffs themselves have,
8 albeit late in the process, provided us with expert
9 reports from their own psychiatrists, own psychologist,
10 excuse me, Dr. Brenman, who apparently intends to
11 testify. There's a different issue about whether the
12 Court is going to allow testimony on this, which I don't
13 want to get into right now, prepared to testify in
14 January, and from their own forensic pathologist, who's
15 prepared to testify in January, and I think fairness in
16 civil discovery requires that our experts have access to
17 this material to the extent the plaintiffs have it, and
18 I therefore respectfully ask that those materials be
19 compelled as part of this motion, as well.

20 And I think, unless the Court has questions for
21 me, I will sit down then and let you hear from the
22 plaintiffs.

23 THE COURT: All right, thank you, Mr. Hill.

24 MR. WISTOW: Your Honor, I would like to put this
25 motion, and the other two motions that your Honor has

1 scheduled for hearing today, in context.

2 What needs to be recalled here is --

3 THE COURT: Excuse me, Mr. Wistow. I just
4 realized that you didn't state your name when you went
5 to the podium and it will help whoever transcribes these
6 proceedings. Mr. Wistow is recognized. You may
7 proceed.

8 MR. WISTOW: Thank you. There's a terrible irony
9 that the plaintiffs are confronted with in this case,
10 and I hope it's going to become apparent in a few
11 moments.

12 This suit was brought in March of 2000.
13 Discovery was resisted by the defendants and, in part,
14 was the reason the judgment, final judgment, was entered
15 against them in July of 2004, which was affirmed by the
16 First Circuit. There was a creditor's bill, your Honor
17 is familiar with that, in 2006, where the defendants
18 were, in effect, deprived of their stock ownership in
19 the Palestinian Investment Fund. There was a motion to
20 vacate all of this in December of 2007, some two and a
21 half years after the original judgment was entered.
22 And, of course, the First Circuit reversed Judge Lagueux
23 because Judge Lagueux refused to vacate the judgment.
24 He imposed a per se rule that a willful defaulter cannot
25 get a vacation or a vacatur of a judgment, and that he

1 needed to hear multiple issues. And, indeed, Judge
2 Lagueux scheduled discovery in this case, as my brother
3 has indicated.

4 What needs to be understood, your Honor, I think
5 it's very central, is the plaintiffs had achieved
6 judgment years before. On October 15th, 2010, six weeks
7 ago, they, the defendants handed to the plaintiffs their
8 expert disclosures, and I'd like to hand them up to the
9 Court. I don't expect the Court to read them, I just
10 want the Court to get a sense of the heft of what was
11 given to us on October 15th. This was -- these
12 documents are the principal bases for the request for
13 the vacatur. May I hand these to the Court?

14 THE COURT: Any objection, Mr. Hill?

15 MR. HILL: I don't object to you getting the
16 documents. I will respond to the characterization if I
17 may separately.

18 THE COURT: All right. I'll give you that
19 opportunity.

20 MR. HILL: Thank you.

21 (PAUSE)

22 THE COURT: These were received by the plaintiffs
23 on October 15th, is that correct?

24 MR. WISTOW: They were sent electronically and
25 received on October 15th. They were under a cover

1 letter where the defendants purported to tender them
2 pursuant to Rule 26(a)(2), which requires disclosure of
3 expert reports 90 days before trial. That rule, of
4 course, allows the other side, if it's applicable, to
5 provide any rebuttal experts within 30 days of receiving
6 the defendants' disclosures.

7 By the way, before I talk about our disclosures,
8 I would like to point out that October 15th is almost
9 precisely 90 days before the scheduled hearing, not
10 trial, which was down for January 18th, 2010, almost
11 precisely that date. If your Honor wants to take the
12 trouble, you'll see that every one, every one of
13 defendants' expert disclosures, with one exception, is
14 dated October 15th, the date we got them. It's clear
15 that the defendants told their experts not to send the
16 reports until that last day. There's one exception, and
17 that exception, one of the several experts, his report
18 is dated October 14th.

19 So, we are confronted then with a disclosure of
20 multiple expert witnesses in areas that are extremely
21 unusual, in some respects. For example, one of the
22 disclosures, Glen Robinson, an expert, supposed expert
23 on terrorism, is going to be talking about the effect on
24 the foreign policy of the United States, is not a very
25 typical situation. And there are other expert reports

1 very unusual in nature. We felt, and we still feel,
2 that Rule 26 is only applicable to experts who are going
3 to testify at trial, and I make a technical distinction,
4 and I'm going to amplify that later, but in an excess of
5 caution, in an absolute abundance of fear, we said we
6 better get our experts in within 30 days of that
7 disclosure to us. Even though we don't think it's
8 required, we don't want to take the chance that somehow
9 the Court will say this is Rule 26 and we violated that.
10 So within 30 days on November 15th we supplied expert
11 reports which I would like to hand up to the Court.

12 THE COURT: All right, you may do so.

13 MR. WISTOW: Again, just for the heft of what was
14 involved here.

15 THE COURT: These were served or transmitted to
16 the defendants on November 15th?

17 MR. WISTOW: That's right. Within the 30 days
18 which we don't even believe was required, but in an
19 excess of caution we did it. And believe me, I think
20 your Honor can see there had to be a lot of scurrying
21 because, for example, one of their experts was a
22 forensic pathologist, a Dr. Baden, who said that he
23 believed that the decedent husband died within
24 approximately two seconds of the attack rather than the
25 up to 30 seconds as your Honor had found, we had to get

1 somebody to rebut that, and we did that, and we supplied
2 that to the defendants within 30 days. At the same
3 time, we were scurrying around trying to respond to all
4 of the other things they were talking about. There were
5 numerous issues that have arisen here.

6 On top of that, your Honor, on top of that, on
7 October 29, 2010, we received from Mr. Hill the
8 investigation of the murders by the Palestinian
9 Authority, I should say the investigation by the
10 Palestinian Authority, of the murders, something that
11 should have been supplied to us six years before, more
12 than six years before. We got that on October 29th.
13 And I'd like to hand that up to your Honor.

14 THE COURT: You may. Is there an objection,
15 Mr. Hill?

16 MR. HILL: Again, I'd like to respond to the
17 characterization, but I understand I'll get a chance to.

18 THE COURT: You'll get a chance to make some
19 remarks. This was received on October 29th from the
20 defendants?

21 MR. WISTOW: Yes, your Honor, and I'm enclosing
22 the cover letter. Now, if you stop and think about what
23 is going on here, this is a case where we have a
24 judgment. It was by default, in part, because there was
25 no adequate disclosure, years ago. We're now in a very

1 compressed period struggling, struggling, to comply with
2 the massive requests that have been put upon us. At the
3 same time we're trying to get discovery out of them. At
4 the same time, there was, I don't know if your Honor is
5 aware of this, there was a motion to intervene by the
6 Palestinian Investment Group for the administrative
7 employees of Gaza. That was heard in front of Judge
8 Lagueux. He denied that. That's on appeal. There's a
9 myriad of activities that have been going on here.

10 We're doing our very best to stay current, and we're
11 confronted with a response by these defendants that our
12 responses to their discovery is not as rapid as they
13 expect.

14 They talked about a psychologist, Dr. Ryan, that
15 they've hired. Dr. Ryan has put in a report that
16 basically says that she disagrees with the methodology
17 that was used by our expert, that it was not a
18 sufficient forensic evaluation. We had to prepare a
19 rebuttal for that. Bear in mind, your Honor, we only
20 got this October 15th. We prepared a rebuttal for that.
21 They brought in a pathologist, Dr. Baden, on October
22 15th. We had to get a rebuttal for that. They brought
23 in two experts, supposedly experts, on Israeli law, a
24 Messrs, lawyers in Palestinian Authority, Dahleh and
25 Shehadeh. We had to get, and we did get, within 30

1 days, responses, expert reports, disputing what their
2 experts said.

3 On November 4th, your Honor, November 4th, the
4 defendants amended their answers to interrogatories and
5 added four new witnesses, Mohammad Dahaln, Hiba
6 Husseini, Rafik Husseini, Afif Safieh.

7 On November 11th, the defendants added three more
8 witnesses in their amended answers to interrogatories,
9 Yousef Qaddah, Hassan Asfour, Mazen Jadallah, and
10 specifically said in their answers to interrogatories on
11 November 11th when they entered this, that they reserved
12 the right to add additional witnesses up through and
13 including the time of the January hearing.

14 At the same time while all of this is going on,
15 not only are we confronted with the appeal in the First
16 Circuit on the motion to intervene, we're fighting about
17 collection efforts in other ports to try to preserve the
18 attachments and restraints we have in various other
19 places. We've done, I believe, a yeoman's efforts.

20 Let me say specifically what the motion to compel
21 is about. It's about interrogatories 19 through 21, and
22 let me specifically address what they've asked for.
23 They've asked for in 19 the witnesses at the hearing.
24 We've given them our experts reports. We fully expect
25 that everyone of those experts will be witnesses at the

1 hearing. We've written to them and said please consider
2 these experts as witnesses pursuant to the answers to
3 the interrogatories. As far as I know at the moment, at
4 the moment I stand here, your Honor, there's one
5 possible fact witness that we're trying to get. I can't
6 say we're going to be able to do it, but we've disclosed
7 what we know at this moment. There's been no
8 requirement other than answers to interrogatories that
9 we make these disclosures.

10 Number 20 is the experts. We've made a full
11 disclosure of the experts. I don't know what else we
12 can do.

13 Then they've asked us in interrogatory number 21
14 for the factual basis that we have if we contend that
15 the amount of the verdict would withstand adversarial
16 testing. Our response to that has been two-fold: One,
17 we've said that that issue is foreclosed, whether or not
18 it would withstand adversarial testing, and indeed, we
19 have a motion pending, a motion in limine, to exclude
20 any evidence attempting to challenge the amount of the
21 award. And the reason we have that, your Honor, is
22 after your Honor made the recommendation to Judge
23 Lagueux for the \$116 million total, the defendants
24 expressly specifically objected to the amount of the
25 award to Judge Lagueux. And I'll read you from their

1 objection. Defendants -- this is verbatim. "Defendants
2 PA and PLO object to the report's recommendation that
3 multi-million dollar amounts be awarded as compensation
4 for the death of one person in the context of an ongoing
5 conflict in which thousands of innocent civilians on
6 both sides have been killed without any hope of
7 compensation." And it goes on. Compensation on such an
8 excessive scale is inappropriate particularly in the
9 case of a person living permanently in Israel or
10 Palestine during the ongoing Israeli Palestinian
11 conflict, et cetera.

12 THE COURT: Mr. Wistow, do you have a document
13 number for what you just read from?

14 MR. WISTOW: Yes, I do, I do, your Honor. Bear
15 with me.

16 THE COURT: You can provide it after the hearing.

17 MR. WISTOW: Your Honor, I can give it to you
18 right now. It's document 271. It was sent by
19 Mr. Sherman on April 19, 2004.

20 THE COURT: Do you have a page number, by chance?

21 MR. WISTOW: Of the quote?

22 THE COURT: Yes.

23 MR. WISTOW: Yes, I do. It's on page 3.

24 THE COURT: Thank you.

25 MR. WISTOW: So, you know, I'm not going to stand

1 here and tell your Honor they did a very good job
2 challenging the amount, but they challenged the amount
3 expressly, and Judge Lagueux denied their objection to
4 your Honor's recommendation. And when they went up to
5 the First Circuit, on the initial appeal, the First
6 Circuit noted the defendants have, and I quote, 402 F3rd
7 282, "The defendants have not challenged either the
8 measure of damages utilized by the lower court or the
9 integrity of its mathematical computation." Now, it's
10 true, it's true, that when the case was appealed the
11 second time to the First Circuit, what I mean by that is
12 after the motion to vacate was filed in December of 2007
13 and was denied by Judge Lagueux, and the case went up
14 again to the Circuit, at oral argument, for the very
15 first time, it was not in anybody's briefs, for the very
16 first time there was a discussion about the amount of
17 the judgment, and my brother, Mr. Strachman, who argued,
18 has no more the ability of total recall than I do, and
19 he had quite forgotten that this issue was fully
20 addressed before, and the Court made some comments about
21 would this withstand adversarial testing, et cetera, but
22 it was never argued before the Court, and it is now the
23 subject of a motion in limine before Judge Lagueux. Now
24 it's true, the First Circuit has sent this thing back
25 for a "holistic" approach, but there are certain things

1 that I submit cannot be reviewed again, should not be.
2 For example, the First Circuit held there was
3 In personam jurisdiction over the PA and PLO. Can it be
4 because there's a resubmission of the case that we're
5 going to relitigate whether there's personal
6 jurisdiction? No, because the First Circuit held there
7 was. That was litigated.

8 Sovereign immunity, that cannot be relitigated,
9 in my opinion. That was adjudicated. Whether there was
10 a political question or not cannot be adjudicated. The
11 fact of the matter is the issue of the amount was
12 litigated, perhaps not very well but it was litigated,
13 and I submit that it is absolutely too late, and that
14 what's going to happen, I hope, is when Judge Lagueux is
15 confronted with this issue, he's going to say the
16 Circuit has asked me to look at all these issues, this
17 is an issue that has been adjudicated, and it's not
18 open, and for that reason I suggest that we have a
19 legitimate reason for not answering the questions on
20 damages.

21 Now, I hope I don't overstep my time here, your
22 Honor, but these are very important issues, obviously,
23 and I'd ask for the Court's indulgence.

24 The specific -- we went on, by the way, to answer
25 the interrogatory about damages, and we said

1 notwithstanding that we think it's foreclosed, we
2 specifically said what we relied on to support the
3 award, and we expressly stated that it was the testimony
4 before your Honor, your Honor's decision, and that's
5 what we rely on.

6 THE COURT: Well, their complaint, Mr. Wistow, as
7 I recall, was the phrase inter alia, meaning among other
8 things, and the suggestion that although you identified
9 three items, or however many it was, the phrase inter
10 alia, I guess, concerned them that you would spring
11 something on them at the hearing. You want to address
12 that part of their complaint?

13 MR. WISTOW: Well, let me say this, I can't think
14 of what else we're going to put in at this point, and if
15 we do come up with something, I represent to you we will
16 instantly identify it. I don't know what else to say.

17 THE COURT: The other part of their complaint was
18 that you, I believe, cited numerous decisions in
19 terrorism cases and yet you used the phrase numerous
20 decisions and yet you cited only one case.

21 MR. WISTOW: If the Court wants me to give a
22 citation of legal cases, we can do that in a few days, I
23 suppose. I mean --

24 THE COURT: I'm just observing at this point,
25 Mr. Wistow, what they complained about.

1 MR. WISTOW: I just don't see that, you know, I'm
2 required to cite law to support it. If that's what it
3 comes down to, and if it makes everybody more
4 comfortable that we're trying to comply, you know, give
5 us a reasonable time and we'll do that.

6 THE COURT: Your point, Mr. Wistow, is you don't
7 feel you have to give them anything on the issue of
8 damages because they're precluded, but notwithstanding
9 that, you have told them the basis for your position
10 that you believe the amount of damages will withstand
11 adversarial testing for these reasons, that's your
12 position.

13 MR. WISTOW: Absolutely. Not only in that
14 answer, but we gave two expert reports to support what
15 the testimony had been before and what your Honor had
16 decided, that would be Dr. Fanning, the pathologist, and
17 Dr. Brenman, the psychologist, so they have those
18 reports. I really don't know what else I could do.

19 Now, they also -- you know, they talk about in
20 their request for production of documents, which we
21 haven't addressed, they want all the documents that we
22 intend to put into evidence. At this point in time,
23 your Honor, other than what the experts are saying, I
24 honest to goodness, I'm not sure what we're going to put
25 in. And my excuse for that, my reason for saying this

1 at this stage is we continually are getting things -- I
2 mean, look at this, October 15th was when we got these
3 complex disclosures. We got disclosures as late as
4 November 1st -- November 11th, I'm sorry. I'm mindful
5 of our obligations under the rules to update
6 interrogatories on a reasonable basis, and we're ready
7 to do that instantly, we really are. And, in any event,
8 we have to do that by December 17th which is two weeks
9 away anyway from the Judge's -- Judge Lagueux's
10 disclosure. They also ask us for documents that were
11 provided by the plaintiffs or relied on by the witnesses
12 for the July 2000 damage hearing. We've given a
13 privilege log and indicated that the great bulk of this
14 is correspondence between Mr. Strachman and the
15 individual plaintiffs and we've given you a privilege
16 log on that.

17 THE COURT: How many documents,
18 approximately, are at issue do you think, Mr. Wistow,
19 there?

20 MR. WISTOW: Under that category, I'm going
21 to say 15 maybe something like this. Does that sound
22 right? And we've provided a privilege log.

23 THE COURT: The defendant cites some case
24 law that says there's a trend or a modern view, or an
25 emerging view that all communications between counsel

1 and expert witnesses should in fact be disclosed because
2 apparently I guess the rationale would be it bears on
3 the opinion of the expert or at least it should be
4 material available to the other side to fairly
5 cross-examine the expert. Do plaintiffs disagree with
6 the case law or that it's a merging trend, or I disagree
7 with the proposition being advanced by the defendants.
8 Would you comment on that, Mr. Wistow.

9 MR. WISTOW: Yes. I think the trend is in
10 that direction but what's significant here is the
11 documents that we have from experts which are on the
12 privilege log, are from two experts who are not going to
13 testify at the hearing. Professor Friedman and Doctor
14 Ziderman (phonetic spelling), who is the economist who
15 gave testimony.

16 THE COURT: And who was Ziderman --
17 Professor --

18 MR. WISTOW: He was the economist.

19 THE COURT: And who was the other person?

20 MR. WISTOW: The other one was Friedman who
21 testified about the shooting and he was a physician who
22 testified about the pain and suffering. Neither one is
23 going to be testifying here. SO I mean, it's just very
24 bizarre to ask for the expert reports. Let me suggest
25 this, your Honor. We've given your Honor a privilege

1 log, if your Honor requires us to turn those over, you
2 know, we'll -- of course, we'll turn them over. It just
3 seems to me totally inappropriate. You know, one of the
4 problems we've have is trying to keep our head above
5 water trying to get ready for this case and it was --
6 we've been -- we don't have the resources that the
7 Palestinian Authority has that is a, you know, a quasi
8 government and they've pulled out all the stops and
9 we're just trying to, as I say, keep our head above
10 water. If your Honor -- what can I say? If your Honor
11 feels that the reports of the two experts who will not
12 be at the hearing should be disclosed we'll disclose
13 them. I think that they shouldn't be because they're
14 not going to be experts at this hearing. In any event,
15 the remaining, the remaining documents they want are the
16 psychological records of the kids, the medical records of
17 the kids, the daycare and preschool records, the school
18 records, all of those things. What is that going to
19 prove? If your Honor recalls, and I know you do, the
20 testimony of the expert, Dr. Brenman on the children was
21 very simple. I don't want to say superficial, but it
22 almost was. It was almost common sense. He said that
23 an 8 month old baby and a 20 month old baby to be
24 suddenly deprived of their father represents
25 psychological trauma. He stands on that, he'll be back

1 to testify to that, he's not saying he did some
2 extensive research with these kids. He stands on that,
3 that's what he's going to say. He went on to say that
4 children who lose their parents under certain -- at an
5 early age are at greater risks for psychological
6 problems in the future which he said was hard to
7 quantify and didn't attempt to quantify. It's almost
8 like common sense but he's prepared to come in and
9 substantiate that and he will. What are we going to do?
10 Are we going to get into a situation where we evaluate,
11 well, did the risk come into being? Didn't it? In
12 other words, are these kids doing well today, are they
13 doing badly? Are we going to open this whole thing up?
14 What if it turns out they're doing badly today, can we
15 increase the award? I suggest not because what happened
16 is you put in a case based on what the situation is at
17 the time. Now your Honor was fully aware of the
18 relative limitations of the testimony. He was not
19 saying that these kids will have psychological problems.
20 And if your Honor rereads your opinion you'll see that
21 you were aware that he did not -- you said there was an
22 increased risk. What shouldn't be forgotten here is a
23 great deal and I don't know how much of the award was
24 the loss of society and companionship. They want to
25 make a big deal out of the psychological injury which

1 the plaintiffs never even made a big deal out of. And
2 never said anything but that there were increased risks
3 which we'll prepared to prove at the trial if it becomes
4 necessary if we have to get into that. Besides all of
5 that the defendants themselves have said in their papers
6 that they've agreed to freeze the issue of the damages
7 as of the 2002 hearing. So, I can't imagine, what in
8 the world are we doing with the school records if the
9 damages are to be frozen as of 2002? You know, Judge,
10 the psychiatrist they've brought in, and I've read the
11 report very carefully, doesn't say these kids are at
12 that increased risk, doesn't say that they didn't have
13 trauma. What it says is Brenman did not do a forensic
14 examination, a true forensic examination, and by the
15 way, he agrees with that that's in the report we've
16 submitted to them he did not do a forensic examination.
17 He gave limited testimony to the Court which was solid,
18 which was correct, and which was adopted by the Court.
19 The defendants also insist that we produce the crime lab
20 material that we have. All I know, Judge, is we've
21 given them everything we had. They want forensics,
22 we've given them everything that we have, they want some
23 color photos, that's -- we've given them everything we
24 have. They themselves admit, your Honor, on Page 5 of
25 their reply to our objection to the motion to compel.

1 They admit their Rule 26(a)(2) does not apply in this
2 situation. All we have is, have we complied with
3 answers to interrogatories and the like. All I can tell
4 your Honor is we've, we have done everything we possibly
5 can. If your Honor feels that there's more that we must
6 do, yup we will move heaven and earth to do it. I don't
7 know what else to say. I hope, for example, we're not
8 ordered to get school records in five days or something
9 like that in Israel for the various reasons I've stated
10 and also the time constraints. But, you know we've put
11 in timely objections, we've put in objections in good
12 faith. And for all these reasons, your Honor, in
13 considering the context that we're in we were trying to
14 get discovery to these people for years and we couldn't
15 do anything and now we're approached. I respectfully
16 ask that your Honor understand the difficulties that
17 we've had in this case. Thank you, your Honor.

18 THE COURT: Thank you, Mr. Wistow. Mr. Hill
19 I don't want to derail your thoughts but I can tell you
20 I am interested in hearing your response to the argument
21 that you really are precluded from relitigating the
22 issue of damages having previously challenged
23 unsuccessfully the amount of the damages so I'd like to
24 have you address that.

25 MR. HILL: Your Honor would like me to start

1 with that issue?

2 THE COURT: Yes.

3 MR. HILL: I'd be glad to. This precise
4 issue is the subject of the plaintiffs', I believe it's
5 called second motion in limine which is not before your
6 Honor today. And let me make a conceptual point and
7 then I'm happy to address the merits if the Court wants
8 me to. So your Honor is being asked to rule on a
9 discovery motion that material will not be admissible at
10 the hearing. There is a --

11 THE COURT: Well, I don't think so.

12 MR. HILL: Okay.

13 THE COURT: I think that's an overstatement,
14 Mr. Hill. I understand you're saying that if I deny
15 that portion of your motion to compel on accepting the
16 plaintiffs' arguments if Judge Lagueux agrees with that
17 that rationale, then one could trace how that result
18 came about. But what the plaintiffs are saying as I
19 understand it, that as to those requests that go to the
20 amount of damages it should be denied because you really
21 cannot relitigate in the context of a motion to vacate
22 an issue that you've already litigated.

23 MR. HILL: Yes.

24 THE COURT: So I didn't mean to cut you off
25 but I, it sounded as if to me you were saying or

1 suggesting that I not reach this issue in the context of
2 this motion and that I allow, if Judge Lagueux doesn't
3 refer that motion in limine to me allow Judge Lagueux to
4 make that decision. And you're nodding your head as if
5 --

6 MR HILL: I'm nodding, yes. Your Honor, is
7 still speaking I don't want to interrupt.

8 THE COURT: Well, then tell me about that
9 I'm always interested if I should defer --

10 MR. HILL: Here's the issue. This could
11 play out in one or two ways. Your Honor could deny our
12 motion to compel and not give us this material. If
13 Judge Lagueux grants the motion in limine then we'll be
14 arguing on appeal, I suppose, that Judge Lagueux erred
15 in granting the motion in limine, and we won't get to
16 put that evidence on at the hearing, and I suppose the
17 motion, however the motion goes, and somebody appeals,
18 that will be an issue for the First Circuit to resolve.
19 If, however, you deny our motion to compel, and Judge
20 Lagueux denies the motion in limine, then we're in a
21 posture where we're having a hearing in January on an
22 issue that the district court has ruled is admissible
23 but we don't have the discovery, and that's going to
24 affect the ability to do the hearing in January. So
25 this is a little bit like Pascal's wager, to a certain

1 extent, right? If your Honor orders this discovery, and
2 this was the first time I heard anything about a burden
3 associated with it, I'm not even sure there's an
4 objection about burdensomeness, but presumably the
5 plaintiffs can produce it, or can produce a reasonable
6 amount of it, and will have it. If Judge Lagueux grants
7 the motion in limine, there's no harm done. It's not
8 coming into the hearing. The problem is the other side
9 of the coin. If your Honor denies our motion to compel,
10 and we don't have the evidence, then Judge Lagueux is
11 going to have to make findings based on the hearing in
12 January when everybody seems to agree this would be
13 relevant to the issue of whether the damages would
14 sustain adversarial testing, and that evidence won't be
15 before him. And so that's the problem with denying it
16 on the basis that it's unlikely to be admissible at the
17 hearing, and that's why I would suggest, as your Honor
18 suggested I was suggesting, that you not reach that
19 issue, but you instead just rule in accordance with, by
20 the way, if there's repeating, the order that your Honor
21 entered in July, which was not appealed to Judge
22 Lagueux, that it is permissible to have discovery on
23 this issue, and I can just remind the Court of that
24 history, and I'm sure you're aware of it, but early on
25 in the discovery period there was a suggestion at a

1 hearing both off the record and on the record, I
2 believe, by Judge Lagueux, that he had a concern about
3 whether this was a legitimate area of discovery, and we
4 filed a motion seeking leave of court to take discovery
5 on this very issue, and the plaintiffs' filed an
6 opposition where they said, you know, we don't agree
7 it's relevant but we don't want to hand the defendants
8 an issue on appeal so we don't oppose the motion, and
9 your Honor ruled that the motion was unopposed and
10 granted it. So if the subject matter that your Honor is
11 being asked to rule on now is whether there should be
12 discovery on whether damages will withstand adversarial
13 testing, you decided that in July. You decided the
14 answer was yes, and so I respectfully suggest that the
15 only issue your Honor ought to be addressing with
16 respect to damages discovery now is whether the
17 particular discovery that is before you is appropriate.
18 And we litigated this on the issue of mental
19 examinations in October. Your Honor concluded that they
20 would be too burdensome on the plaintiffs and didn't
21 allow them, and that was consistent with your Honor's
22 ruling that, you know, the general subject matter may be
23 relevant but this particular discovery is not. So the
24 particular discovery before you, I would suggest, is not
25 unduly burdensome. In fact, Mr. Wistow has said he was

1 prepared to answer the interrogatory. He said he's
2 prepared to produce the communications with the experts
3 who testified at the prior hearing. He's told me for
4 the first time today that he's given me all the
5 information on the pathology and on the crime scene,
6 anyway. So really the only issue is how much of the
7 children's material is it reasonable for them to produce
8 to us in the admittedly short amount of time that we
9 have left, and I would suggest that the Court can order
10 that they can give us what's reasonably available.
11 Presumably the custodians of the children have this
12 material, and it's not hard to get, or they can get it
13 from the children's school. So that's how I would
14 suggest your Honor deal with this.

15 Now, if your Honor wants me to address the merits
16 of the motion in limine, I admittedly wasn't prepared to
17 do that. I can do it as best I can, and I'd refer your
18 Honor to our opposition brief and ask your Honor to read
19 that before you rule on the issue, but I really would
20 suggest to the Court that sitting in the context of the
21 discovery motion the better practice would be to rule on
22 the merits of the discovery motion without attempting to
23 essentially prejudge what the district court may do on
24 the motion in limine. Have I adequately addressed the
25 Court's concern?

1 THE COURT: You have, Mr. Hill.

2 MR. HILL: Thank you, your Honor. Let me return
3 to the batting order in which things came up. I just
4 want to address some things in the order that Mr. Wistow
5 addressed them.

6 Mr. Wistow suggested that the material we served
7 in the form of our expert reports was, I don't think he
8 said it, but there was a notion that maybe we had done
9 something improper and I wanted to just be clear that I
10 don't believe we have. We provided those materials at
11 the date they were due under Rule 26(a)(2),
12 approximately 90 days, a little more, technically, than
13 before the hearing on January 18th, so those were timely
14 disclosures. We believe we were required by the rules
15 of discovery to produce them, so I'm not sure what the
16 basis would be to complain about them.

17 He also suggested, and this is why I wanted to
18 clarify that these were the principal bases for a
19 vacatur, I would suggest that's an
20 over-characterization. We have, I believe, six expert
21 witnesses. We disclosed a number of fact witnesses. We
22 produced a number of documents, including as Mr. Wistow
23 alluded to, the Palestinian Security Services own
24 investigative file of the people who killed the Ungars,
25 so there's a substantial amount of evidence that we've

1 produced and will be relying on that at the hearing in
2 January.

3 He also suggested that we first produce the
4 investigative file on October 29th. He did not give me
5 a copy of what he handed your Honor, but if your Honor
6 could look at that, or if I could see it, I believe that
7 bates range was produced --

8 THE COURT: Miss Saucier, this is the third
9 document, I believe. Show that to Mr. Wistow to make
10 sure that that's the document that he handed up third.

11 MR. WISTOW: It is, your Honor.

12 THE COURT: All right.

13 MR. HILL: Okay. Your Honor, what this says then
14 is it's material that is in both Arabic and certified
15 translation in English. The Arabic materials were
16 produced on September 27th which was the response date
17 for the third request for production of documents. We
18 produced the original materials on the day in response
19 to the third request which we'll be arguing about later
20 today, on the day they were due. It did take us some
21 time to get the certified translation, and we provided
22 that on October 29th. So the plaintiffs have had this
23 material since September 27th, albeit it in a foreign
24 language, which was one of the issues in the case. I'm
25 happy to tender this back to the Court.

1 THE COURT: Please do so.

2 MR. WISTOW: I'd like the Court to take judicial
3 notice I don't speak or read Arabic, either.

4 MR. HILL: Neither do I, and I also don't speak
5 or read Hebrew, but that's an issue in the cases,
6 unfortunately.

7 So, you know, I'm not sure that there -- I mean,
8 if delays and translations it's the nature of the case,
9 there's nothing improper with us producing the certified
10 translations in October, having given them the original
11 Arabic on the date the response was required. And, of
12 course, we are I note, of course as everybody agrees,
13 required to supplement by rule, and so the fact that
14 we've supplemented our interrogatory responses with
15 additional witnesses as we've identified them is what
16 we're supposed to do. So there's nothing wrong there.

17 With respect to the plaintiffs' experts,
18 Mr. Wistow said they've now given you the reports and
19 given us the reports for the witnesses they're going to
20 call. Again, if I may look at what was given to the
21 Court, I just have a question about it because there was
22 a late report. I'm not sure if it's part of that
23 package.

24 THE COURT: Miss Saucier, give it to Mr. Hill.
25 Mr. Hill, show that to Mr. Wistow to make sure that's

1 what was handed up second.

2 MR. WISTOW: It is, your Honor.

3 THE COURT: Thank you.

4 MR. HILL: Your Honor, there was -- I believe I
5 received one report on November 12th, one on the 13th,
6 four on the 15th, and then I received a report, which is
7 the last one in this package, on November 24th, which is
8 after the close of discovery. So just so the record is
9 clear, one of these was not even given to us until after
10 discovery had closed, and that's the report of
11 Dr. Boaz, B-O-A-Z Shnor, S-H-N-O-R.

12 THE COURT: Miss Saucier, give the sticky to
13 Mr. Hill and ask him to just attach that sticky to the
14 document that he says he got on November 29th.

15 MR. HILL: I believe the Court said the 29th. It
16 was the 24th. It was the day before Thanksgiving.

17 THE COURT: Thank you.

18 MR. HILL: So if, in fact, and let me make this
19 point, the plaintiffs have also identified three other,
20 I guess, potential expert witnesses for whom we have not
21 got reports or interrogatory responses. I wasn't
22 entirely clear from what Mr. Wistow said whether those
23 three people are going to be called at the hearing or
24 not. If they're not, obviously I need their
25 interrogatory responses and their reports against the

1 eventuality that they're allowed to testify so I can
2 properly examine them otherwise I don't have any idea
3 what they would say, and for that reason, unless
4 Mr. Wistow has taken those folks off the table, we're
5 going to need an answer to the pending interrogatory.
6 So all this points up the fact that the plaintiffs ought
7 to give us a clear final answer to the interrogatory,
8 and we ought to get it respectively before the 17th of
9 December because on December 17th, two weeks from today,
10 we have to file our pre-hearing memoranda, and in order
11 for us to effectively inform Judge Lagueux of who we're
12 going to call, what exhibits we're going to use, it
13 would obviously be helpful to know who they're going to
14 call and what exhibits they're going to use. And
15 Mr. Wistow talked with respect to exhibits that he
16 wasn't quite sure yet what they were going to use.
17 Well, if he files a brief on the 17th of December that
18 says here are my exhibits, and I have to file a brief on
19 that same day saying here are my exhibits, obviously
20 it's going to be very difficult for us to ensure that
21 we've got the right exhibits that respond to theirs. So
22 I would respectfully request that the Court enter the --
23 grant the motion to compel, order them to provide us
24 with all the documents they're going to use, sometime
25 reasonably before December 17th, identify any other

1 witnesses. He mentioned there was a fact witness who
2 may be out there. I obviously don't have a chance to
3 depose that person. I'm maintaining my right to
4 preclude them, but I ought to know who they are so that
5 I can, you know, if there's a document I need to put on
6 my exhibit list, or a witness I need to put on my
7 witness list. If I don't know who they are, there's no
8 way for me to do that. And again, this all goes to
9 efficiently helping Judge Lagueux know what's going to
10 happen in January. I think those are reasonable
11 requests and they ought to be ordered.

12 Let me make a couple other points about damages.
13 With respect to the communications with the experts.
14 Those documents are on a privilege log the plaintiffs
15 provided to us, and your Honor mentioned -- I don't
16 think there's a serious legal dispute about the
17 discoverability of that material, at least prior to the
18 amendment to the rule, and so we'd like to get those
19 materials.

20 THE COURT: Mr. Hill, when you say prior to the
21 amendment to the rule, which amendment --

22 MR. HILL: Nobody's mentioned it yet. Rule 26
23 was amended effective yesterday, and so under the
24 implementation provisions of that, it applies to cases
25 filed after yesterday, and whatever the standard

1 language is, you know, to the extent consistent with
2 equity to pending cases. Now, nobody has argued that
3 you ought to apply the new rule to this, particularly
4 where these communications took place in 2002, we asked
5 for them long before December 1st, the motion was ripe
6 long before December 1st. You know, we're only here
7 because of the accidents of people's timing and so
8 forth, so unless there's some request, I don't think the
9 Court ought to consider the current rule. But there are
10 -- these are documents 18 to 25 on their list. It
11 obviously wouldn't be very difficult for them to produce
12 them, and they're listed on page 13 of our brief which
13 is document 572. So I would request that the Court
14 order those.

15 Now, Mr. Wistow made the point --

16 THE COURT: Which requests are you referring to,
17 Mr. Hill?

18 MR. HILL: Well, I'm talking about the
19 plaintiffs' privilege log regarding defendants' request
20 number 25 and 26. The pertinent portion is reprinted on
21 page 13 of our motion to compel, which is document 572.

22 THE COURT: So you're asking the Court order that
23 the documents listed in the privilege log be produced to
24 you?

25 MR. HILL: Yes, your Honor. And now Mr. Wistow

1 makes a point that the two experts that these pertain to
2 will not be testifying in January. That doesn't mean
3 they're not relevant because, again, assuming your Honor
4 is not going to rule that there won't be any evidence on
5 damages, and whether they would withstand adversarial
6 testing at the hearing in January. These experts
7 presented testimony to your Honor on which you relied in
8 fashioning the damages amounts, and the admissibility of
9 that testimony, the reliability of that expert
10 testimony, will be one of the issues that is confronted
11 in January, assuming we get to litigate the issue of
12 whether the damages will withstand adversarial testing.
13 So they would be relevant even though those people won't
14 be appearing.

15 On the documents related to the children, when
16 you're talking about whether the damages are likely to
17 withstand adversarial testing, the issue is, is the
18 amount of money awarded appropriate for the amount of
19 damages the children sustained, and I respectfully
20 submit that there's a real question here that wasn't
21 adequately developed in the prior record and we ought to
22 have an opportunity to develop it at the hearing in
23 January. These children were quite young at the time
24 their parents were killed, and as Dr. Ryan points out in
25 her report, the fact that someone is an orphan doesn't

1 automatically translate into them having a mental
2 illness, and your Honor had expert testimony at the time
3 about the likelihood of that, and I submit relied on
4 that in fashioning a damages amount, and what actually
5 happened to the children as they have grown will
6 obviously inform the reliability of a prediction that
7 they would have mental illness, and Mr. Wistow suggested
8 that perhaps -- and again, we don't have any of this
9 information so I don't know whether it's true or not,
10 what if one of these children has developed a mental
11 illness, well, that would obviously be pertinent. But
12 the point I would make is this, your Honor made
13 identical awards for both children. If one has
14 developed mental illness, and another has not, that
15 might be an argument about why the award shouldn't be
16 identical. And so I submit that this is clearly
17 relevant and would a Judge Lagueux in making
18 determinations about whether these amounts are likely to
19 withstand adversarial testing and I therefore ask that
20 -- I'm not asking for something unreasonable but to the
21 extent that these documents are reasonably available to
22 the plaintiffs that they be produced to us before
23 December 17th so we can utilize them at the hearing to
24 the extent the Court allows argument on that issue.

25 And on the last point about the pathology reports

1 and crime scene reports. Mr. Wistow has said we have
2 everything they have. There's one issue about whether
3 we have color copies of all the photos, but we can work
4 those out amongst ourselves. So based on counsel's
5 representation that they've produced everything they
6 have, I don't see a reason for the Court to compel
7 material that they've on the record said they don't have
8 anymore.

9 Unless the Court has questions for me, I think
10 I'm ready to conclude on this motion.

11 THE COURT: All right, Mr. Hill.

12 MR. HILL: Thank you, your Honor.

13 MR. WISTOW: May I respond very briefly, your
14 Honor?

15 THE COURT: Very briefly.

16 MR. WISTOW: The motion that my brother referred
17 to, to conduct discovery regarding damages, we expressly
18 preserved, expressly preserved, all objections of any
19 nature whatsoever regarding any questions put that's in
20 the Court's documents. We simply said there was no
21 reason that we wanted to fight about this at that time
22 but preserved every single objection which we are now
23 making on a timely basis. To require us to turn over
24 the experts reports that are on the privilege list,
25 experts who are not going to testify, almost certainly

1 invites us to now bring those experts in because who
2 knows what ambiguities are going to arise out of looking
3 at say raw data or materials that are used without the
4 person there. What is suppose to happen with those
5 documents? It just intrudes in this case another
6 unnecessary complication.

7 Finally, and I can't emphasize this too strongly,
8 your Honor, nobody ever said, neither our expert
9 Dr. Brenman nor your Honor, ever said that these
10 children would have mental illness. No one ever came
11 close to that. All it said was the loss of a parent
12 increases the risk. That's in the record, and your
13 Honor adopted that, and that's true and it's
14 uncontrovertible, and to start now getting into this
15 issue about what really happened to these kids flies in
16 the face of every case that's ever happened. You can't
17 get into this. People after their awards, some of them
18 go to Lourdes and they make a fantastic recovery, and
19 what happens then? The defendant comes in and asks for
20 a new trial? The thing is frozen at the time. To ask
21 now what happened to these kids since then introduces
22 into this already amalgam of confusion, another web, and
23 one that's absolutely prohibited. So I ask your Honor,
24 however convenient or inconvenient it is to get these
25 things, and I don't know, I don't know what the

1 situation is in Israel in getting these records, however
2 convenient or inconvenient, I ask your Honor not to
3 order production of records which are not relevant to
4 what we're talking about.

5 THE COURT: Mr. Wistow, is it your position that
6 it's frozen in time --

7 MR. WISTOW: Yes.

8 THE COURT: -- does that depend on whether or not
9 there has been litigation or with the amount of damages?

10 MR. WISTOW: I don't understand your Honor's
11 question. I apologize.

12 THE COURT: Let's say Hamas, who never did
13 anything in this case --

14 MR. WISTOW: Right.

15 THE COURT: -- in 2010 files a motion to vacate
16 the judgment and argues that the amount of the judgment
17 will not withstand adversarial testing, and they're
18 making the same argument these defendants are making --

19 MR. WISTOW: Yes.

20 THE COURT: -- they want to get the school
21 records of the children, the mental health records of
22 the children to show that --

23 MR. WISTOW: I understand.

24 THE COURT: -- the children have not suffered so
25 much --

1 MR. WISTOW: Now I understand your Honor's
2 question.

3 THE COURT: -- does it make a difference?

4 MR. WISTOW: No, it doesn't make a difference for
5 this reason, for this reason, if the expert testified
6 these children are having tremendous problems today, he
7 said that to your Honor, and your Honor adopted that,
8 and the fact of the matter is that was a bunch of
9 baloney, unless it's relevant, I think what needs to be
10 done is would the award withstand adversarial testing is
11 based on what is the testimony and what did your Honor
12 rely on and what did you conclude. So if he had said,
13 yes, these children are having terrible psychological --
14 they can't sleep at night, they're doing terribly at
15 school, and they will never get out of second grade, if
16 that's what he said and your Honor adopted that, then I
17 could see where this would potentially become very
18 relevant, but we need to focus on what is it that
19 happened. What was the testimony and what did your
20 Honor decide. I implore your Honor, and I'm sure you've
21 done it, to reread your Honor's recommendation and
22 you'll find that it's exactly what I said, that the testimony
23 was these kids are at an increased risk, period. He
24 didn't say 40 percent, 90 percent. You said that, too.
25 And it's true, and we're prepared to prove that.

1 THE COURT: All right, thank you, Mr. Wistow.

2 MR. WISTOW: Thank you.

3 THE COURT: We're going to take a ten minute
4 recess and then we'll take up the remaining two motions.
5 (RECESS)

6 THE COURT: Before we proceed to the second
7 motion, I just want to ask plaintiffs' counsel about the
8 first motion. The defendants in their memorandum say
9 basically this is what they're seeking in this motion,
10 the first motion, the identity of plaintiffs' hearing
11 witnesses, expert reports or any expert witnesses
12 plaintiffs may call for hearing, documents plaintiffs
13 may offer in evidence at hearing, and evidence regarding
14 plaintiffs' contention that the amount of damages would
15 withstand adversarial testing. So, four things. The
16 first thing, identity of plaintiffs' hearing witnesses.
17 Mr. Wistow, do I understand correctly, plaintiffs say
18 they have disclosed all witnesses with the possible
19 exception of one?

20 MR. WISTOW: Yes, your Honor. As matters now
21 stand, the only witness other than an expert is a fact
22 witness that we don't know whether or not he's going to
23 be available we can use him. That's all we know at the
24 moment.

25 THE COURT: And as to expert reports, or any

1 expert witnesses that plaintiffs may call at the
2 hearing, you say you provided that already?

3 MR. WISTOW: Yes, we have.

4 THE COURT: And any documents plaintiffs may
5 offer in evidence at the hearing, you have provided
6 that.

7 MR. WISTOW: No, I'm not saying that.

8 THE COURT: You're not saying that.

9 MR. WISTOW: I'm not saying that. We really
10 don't know. I can say we will use all of the documents
11 that have been exhibits in the various motions to date.
12 If we have to go through the formality of filing an
13 interrogatory that says that, we'll do that. But we
14 really -- I don't know how else to say this, we have
15 been so deluged with activity in this case that we're
16 not a hundred percent sure of what the exhibits are
17 going to be at this point. I don't know what else to
18 say.

19 May I just add one point on that? I just want to
20 hand up to your Honor a copy of the docket from June
21 1st, 2010 to November 30th, I've never seen anything
22 like it, and, you know, and it gives you an idea of
23 what's been going on.

24 THE COURT: Mr. Wistow, on the third category,
25 documents plaintiffs may offer in evidence, your

1 response is, no, you're not representing that you have
2 provided all the documents but you are representing that
3 documents that you might offer in evidence at the
4 hearing have previously been introduced as an exhibit in
5 some proceeding.

6 MR. WISTOW: Yes.

7 THE COURT: So we're not going to have a
8 situation where the defendants are going to say we've
9 never seen this document before, because any documents
10 the plaintiffs intend to utilize at the hearing in
11 January will have been previously provided to the
12 defendants somewhere along the line?

13 MR. WISTOW: By December 17th, certainly. I'm
14 not -- I'm embarrassed to be in this situation, your
15 Honor, but we've done everything humanly possible to try
16 to -- to comply.

17 THE COURT: Going back to the first --

18 MR. WISTOW: Excuse me. I think there's one
19 other, one other issue. Mr. Strachman reminds me that
20 there are some reports -- I believe we have supplied the
21 reports of the experts on Israeli law. I believe we
22 have. To the best of my knowledge, your Honor, we have
23 supplied the reports of every expert that we intend to
24 use.

25 THE COURT: Mr. Wistow, just going back to the

1 first two categories.

2 MR. WISTOW: Yes.

3 THE COURT: The identity of your witnesses and
4 the expert reports for those witnesses.

5 MR. WISTOW: Yes.

6 THE COURT: The January hearing, you say you've
7 given this to defendants already.

8 MR. WISTOW: To the best -- I believe we have.
9 Is there any doubt about that, Mr. Strachman? To the
10 best of my knowledge, that's right, your Honor.

11 THE COURT: In terms of the Court granting the
12 motion as to those two categories, is there any
13 objection from the -- at this point, if I say that as to
14 those two categories of documents, identity of witnesses
15 and expert witness reports, plaintiffs represent they
16 have provided all such names and reports to the
17 defendants?

18 MR. WISTOW: Expert witnesses.

19 THE COURT: Yes.

20 MR. WISTOW: That's -- what I don't, what I don't
21 want to get mixed up on here is we don't believe that
22 Rule 26(a) applies. We're complying pursuant to answers
23 to interrogatories. So what we're saying is we've
24 answered the interrogatories with reference to the
25 experts. That's what we're saying. We don't want to be

1 conceding that Rule 26(a) applies to the expert
2 disclosure.

3 THE COURT: But you've also identified all your
4 witnesses, expert and nonexpert, for the January 17th
5 hearing?

6 MR. WISTOW: With the -- as I said, your Honor,
7 there's a possibility of at least one fact witness, at
8 least one --

9 THE COURT: But previously, Mr. Wistow, you said
10 one witness, now you're saying at least one witness --

11 MR. WISTOW: Well --

12 THE COURT: How --

13 MR. WISTOW: There's only one that I'm cognizant
14 of now. There's been such activity in this case, I
15 don't want to stand here and say that if we have some
16 kind of lightning bolt that hits us going over all of
17 this before December 17th that we can't supply it. I'm
18 not trying to be elusive.

19 THE COURT: Is there any reason why you could not
20 definitively identify this possible additional witness
21 in five days from today's date?

22 MR. WISTOW: I don't know. He's in Israel, and I
23 don't know. I, I --

24 THE COURT: All right.

25 MR. WISTOW: I don't know.

1 THE COURT: All right, fine. I just wanted to
2 ask those questions.

3 MR. WISTOW: I'm trying to be as candid with the
4 Court as possible.

5 THE COURT: Thank you. Now with regard to the
6 documents pertaining to damages that you claimed a
7 privilege on. Today is Friday. I want to decide these
8 motions as quickly as possible. I'm not sure I'm going
9 to look at them but I think I'd like you to submit them
10 to chambers for a possible in camera examination, so if
11 I decide I need to do an in camera examination of them,
12 I'll have them. I can do it this weekend, and then I
13 can just rule as opposed to waiting until Monday and
14 then deciding I need to see them. Could you see that
15 copies of those documents that you claim are privileged
16 as to your -- I'm referring to the damages experts.

17 MR. WISTOW: Just the experts, not the
18 communication with the clients.

19 MR. HILL: Your Honor, if it will aid the Court,
20 I haven't moved on the communications with the clients.
21 I've only moved on the ones with the experts, which I
22 believe are 18 to 25 on the --

23 THE COURT: Number 18 to 25?

24 MR. HILL: 18 to 25.

25 THE COURT: 18 to 25. Would you submit those

1 documents, 18 to 25, to my chambers today?

2 MR. WISTOW: May we do that --

3 THE COURT: Mr. Strachman?

4 MR. STRACHMAN: I'm pretty sure I can, Judge.

5 THE COURT: All right. I'll be here until 6.

6 MR. STRACHMAN: Judge, I have a situation, Jewish
7 Sabbath, at 3:30.

8 THE COURT: Okay. I understand.

9 MR. STRACHMAN: I'm going to do my best when we
10 get out of here.

11 THE COURT: If you're not able to, I understand,
12 Mr. Strachman.

13 MR. STRACHMAN: Thank you.

14 THE COURT: If it has to wait until Monday, it
15 has to wait until Monday, fine.

16 MR. STRACHMAN: Okay, thank you.

17 THE COURT: Okay, fine. That takes care of my
18 questions on that first motion. We're now going to go
19 to the second motion.

20 The second motion is document 583. This is
21 plaintiffs' judgment creditors motion to strike
22 defendants' objection to and compel compliance with
23 certain requests contained in plaintiffs' judgment
24 creditors third request for production. Mr. Wistow.

25 MR. WISTOW: Thank you, your Honor. If your

1 Honor has looked at the request for production, you'll
2 notice that it's virtually identical in terms of topics
3 to the request for 30(b)(6) depositions where your Honor
4 made a ruling, and that's in docket number 578. You'll
5 recall there were very extensive request for produc --
6 excuse me, request for depositions under 30(b)(6), and
7 your Honor whittled them down very significantly in an
8 order which is number 578.

9 We filed the request for production which
10 mirrored the 30(b)(6) request for depositions long
11 before your Honor had ruled, as you did, in number 578.
12 Once -- and by the way, you ruled on that on October
13 28th, the 30(b)(6), and what you indicated was that you
14 would allow discovery in certain areas, and just to sum
15 them up, willfulness of the default that was objected
16 to, and as a matter of fact the subject of appeal to
17 Judge Lagueux now that the defendants contend that their
18 willfulness and the degree of willfulness is not open to
19 review at this time. The second was the timeliness of
20 the motion to vacate, which they also contended was not
21 open to review. Your Honor disagreed. That's also on
22 appeal. But in any event, the existing order is for
23 willfulness, timeliness. Your Honor indicated that it
24 was appropriate to ask about the relationship between
25 the Palestinian Investment Fund and the defendants,

1 their knowledge about the collection efforts that the
2 plaintiffs were making to recover under the judgment of
3 2004, the Palestinian Investment Fund actions in
4 connection with those attempts to collect. Your Honor
5 ruled that it was appropriate to ask questions about
6 meritorious defenses, and also whether or not there was
7 prejudice to the plaintiffs because of the delay in
8 discovery, and the delay in the motion to vacate, and
9 the basis for the defendants' affirmative contention
10 that there was no prejudice. Your Honor under that
11 heading also said we would be entitled to ask questions
12 about the roles of certain leadership individuals who
13 were noticed to deposition in the original case and
14 whose failure to be produced was part of the reason for
15 the default judgment. Your Honor indicated we could ask
16 about political ramifications of the judgment, the
17 effect on international relationship, and finally how
18 the defendants' ability and willingness to participate
19 in discovery differed today from where it had been on
20 January 27, '03, and your Honor expressly referred to
21 this when a Mr. Al- Kidwas wrote a letter to your Honor.

22 First I want to say, I don't, for the life of me,
23 understand how my brother can say that we did not meet
24 and confer on these requests for productions. His own
25 attachments to his objection shows the enormous amount

1 of time, not very productive time, that was spent trying
2 to work something out, but there was an enormous effort
3 to try to resolve this. I don't know where in the world
4 he can come up and say that there's been no meeting to
5 confer.

6 After your Honor ruled in docket number 578

7 limiting the issues, we've, in turn, attempted to
8 confine our motion to those matters that fall within
9 what your Honor said are legitimate areas.

10 Specifically, and I'm going to do this in chronological
11 order of the numbers of the request for production, the
12 first is number 4.0 to 4.Z. Every one of these

13 interrogatories relates to willfulness and timeliness.

14 I said interrogatories, I misspoke. Request for

15 production. They ask for any kind of records from the

16 Palestinian cabinet, or the Palestinian Liberation

17 Organization's executive committee, dealing with the

18 judgment of 2004, the default judgment, and the 2006

19 creditors bill judgment. That's the judgment where

20 Judge Lagueux assigned all of the PA's ownership

21 interest in the PIF over to the plaintiffs. The motion

22 contains an error in it. It refers to any documents

23 relating to the action. That's not what the request for

24 production -- the request for production, and all we're

25 pressing, is documents that relate to the 2004 default

1 judgment and the 2006 judgment on the creditors' right.

2 The defendants have stated after very lengthy
3 objections, most of which are boilerplate, that they
4 claim that neither the PA cabinet nor the PLO executive
5 committee has any such documents. And I'll just read
6 you what their response is to several of these. The
7 defendants hereby incorporate by reference as is fully
8 set forth herein the foregoing general and specific
9 objections. Subject to, and without waiving the
10 foregoing general and specific objections, and without
11 prejudice to defendants' right to modify, amend or
12 supplement their responses as appropriate, defendants
13 state that there are no documents responsive to this
14 request. Now all I would ask there, your Honor, to
15 those responses, is that to avoid any ambiguity later,
16 that the objections be stricken, and if they want to
17 stand and say there are no such documents, well, of
18 course, we have to accept that, and so I would ask that
19 for items 4.0 through 4.R.

20 Now, items 4.S through V are a little bit
21 different. They're related but different. 4.S through
22 4.V specifically asks for such records of any ministry,
23 agencies, department or bureau rather than the
24 Palestinian Authority's cabinet or executive committee
25 of the PLO. And interestingly enough, when it comes to

1 responding to those requests -- and again, your Honor,
2 these are the documents relating to the judgment, the
3 default judgment. This is related to the default
4 judgment, and which your Honor has already ruled, and I
5 believe consistent with what Judge Lagueux has ordered,
6 that the willfulness is an open issue, and their
7 response -- I'm not even going to bother reading the
8 general and specific objections because they're
9 boilerplate, the same throughout everything here, but
10 their response is as follows, and it's very telling:
11 Defendants hereby incorporate by reference as is fully
12 set forth herein the foregoing general and specific
13 objections. This is 4.S, your Honor. Subject to and
14 without waiving the foregoing general and specific
15 objections, and without prejudice to defendants' right
16 to modify, amend or supplement the responses as
17 appropriate, defendants state they will produce
18 documents containing nonappropriate and nonprotected
19 information within their possession, custody or control,
20 that are responsive to a reasonable and proper scope and
21 interpretation of this request, and that can be found
22 through reasonable search efforts by defendants.

23 Now, your Honor, if that passes muster as a
24 satisfactory answer to a request for production, I'm
25 going to use it myself from now on in every case that I

1 have because it says nothing. It says we're going to
2 produ -- first of all, we have objections, then, but
3 notwithstanding those objections, we'll give you the
4 stuff that's nonprivileged and nonprotected so long as
5 it's subject to a reasonable and proper scope of
6 interpretation. It's absolute smoke, that answer. Now
7 if they want to say there are no such documents, there's
8 nothing I can do about that. But it's a world of
9 difference between the answers saying they have none and
10 this really elusive answer. And so I would ask your
11 Honor that you order production of those documents.
12 They're absolutely central to the hearing on willfulness
13 and timeliness.

14 By the way, I might point out to your Honor, I
15 don't know if your Honor is aware of this, that within
16 the last, and I've lost track of time, I'm going to say
17 the last couple of weeks, anyway, no more than that, the
18 defendants have now filed a motion to vacate the 2006
19 creditors' bill judgment. So we're not talking just
20 about the original 2004 judgment, they're trying to
21 vacate the second creditors' bill judgment. And one of
22 the things we're saying here is that they sat on their
23 rights, let years go by, let us litigate in all kinds of
24 other courts trying to collect on this thing, and just
25 on that timely and -- I just go on. I should go on to

1 the next subject.

2 We're asking that they be compelled to produce
3 the items referred to in 6.J.L, and basically those go,
4 I don't know how anything could go more directly to
5 meritorious defense than these items, and what they are,
6 your Honor, is -- and recall, by the way, that the
7 murder in question was in June of 1996. What these are
8 asking for is, are the records of any communications,
9 written agreements, between Hamas and on the one hand
10 the PA, on the other hand the PLO, and finally Fatah,
11 which is the largest political component of the --

12 THE COURT: Excuse me, Mr. Wistow, you're talking
13 about 6.J through 6.L?

14 MR. WISTOW: That's right.

15 THE COURT: I have your memorandum in front of
16 me.

17 MR. WISTOW: Yes.

18 THE COURT: And you just concluded speaking about
19 requests 4.0 through 4.V.

20 MR. WISTOW: Yes.

21 THE COURT: And the next group that's addressed
22 in this request 9.A to B, 9.U to V, 13.H, S, I'm sort of
23 flipping through your memo trying to find 6.J.

24 MR. WISTOW: It's there. What I've done, your
25 Honor, is I've put them in a slightly different order

1 than they are in the memo. I put them in the order, the
2 absolute chronological order, the correct order. 6.J
3 through L is -- if your Honor wishes, I can try to find
4 that. I represent it's in the memo.

5 THE COURT: Well, I see on page 15 there are
6 three lines. It says request 6.J to L seeks documents
7 directly related to defendants' claimed meritorious
8 defenses.

9 MR. WISTOW: Yes, exactly.

10 THE COURT: So that's it?

11 MR. WISTOW: Yes.

12 THE COURT: Okay, continue.

13 MR. WISTOW: What I wanted -- I thought it was
14 better. I apologize for the way they -- I think it
15 would have been clearer if we did the memo in the
16 correct order, the chronological order of the requests
17 rather than -- that's what I'm trying to do now.

18 THE COURT: All right.

19 MR. WISTOW: Because what's happened, your Honor,
20 is you can see that the documents are so lengthy that we
21 thought it better to just attach them as an exhibit, so
22 I thought when your Honor's looking at these things it
23 would be easier to look in correct -- I keep saying
24 chronological order, I guess the correct sequential
25 order is what I really mean.

1 THE COURT: All right.

2 MR. WISTOW: In any event, 6.J to L relates to
3 communications between Hamas and the PA, PLO and Fatah,
4 in the period September 1st '93 to June 9th '96, and
5 what that relates to, your Honor, is the early date,
6 really the creation of the PA under the Oslo Accords and
7 the last date relates to when the murder took place, and
8 we're asking -- we're saying there's agreement -- it's
9 undisputed in this case. They're claiming that Hamas
10 committed the murders and that they had nothing to do
11 with Hamas at that time and, in fact, Hamas was acting
12 contrary to their wishes. Now, again, we have this
13 bizarre response from them on these issues where they
14 say again, defendants state they will produce documents
15 containing nonprivileged and nonprotected information
16 within their possession, custody or control that are
17 responsive to a reasonable and proper scope and
18 interpretation of this request, and that can be found
19 through reasonable search efforts by defendants. So
20 again, we have that, you know, we'll give you something
21 if we feel like it answer, and this is very very central
22 to the meritorious defense issue.

23 The next in sequential order, your Honor, is 9.A
24 and B, and what those requests directly relate to are
25 three issues that your Honor ruled were relevant. One

1 is the willfulness of the default, next is the
2 timeliness, and a new issue here, their claim that this
3 relates to willfulness. They had claimed in their
4 pleadings earlier that they had no structure in place to
5 monitor these lawsuits, will take care of these
6 lawsuits, and that was part of why everything sort of
7 went under the radar and they got defaulted, and what
8 9.A and B asks is who was monitoring the lawsuits that
9 they -- the terrorists lawsuits that they were involved
10 in, in Israel and the United States in the period 1993
11 when the PA was created through 2007. Now if the
12 argument needs to be made that this is too broad a
13 period of time, which I don't think it is, what I would,
14 as a minimum, would ask the Court to give us is what
15 were they doing in the period that this lawsuit was
16 pending, which is the years 2000 through 2006. And the
17 only reason I say 2006 is that's the date of the
18 creditors' bill default, which they're also asking be
19 vacated. So I deposed Prime Minister Fayyad in
20 Jerusalem, and he testified that indeed they had
21 policies and guidelines for handling these cases at
22 least from 1993 on, and that he, Fayyad, was in charge
23 of the Israeli defense cases, at least from 2003, and
24 we're asking your Honor that we get the records
25 regarding those lawsuits, at least for the period 2000

1 to 2006, which is directly relevant to the default
2 period here, and we're asking flat out that they give us
3 the policies and procedures which is 9.U through V, the
4 policies and procedures that Fayyad testified under oath
5 existed at least from 1993.

6 10.A through Q are documents relating to the
7 relationship between the Palestinian Authority and the
8 Palestinian Investment Fund which was expressly ruled by
9 your Honor to be an appropriate area.

10 We're also asking within that group for documents
11 that reflect the Palestinian Authority's awareness of
12 the 2006 creditors' bill judgment which now four years
13 later they're trying to vacate that, also.

14 And probably most important, most important in
15 this category, are records regarding the payments from
16 the Palestinian Investment Fund to the Palestinian
17 Authority. I can't emphasize how central those
18 documents are to what we're trying to prove in this
19 case, and let me explain a little bit more because
20 there's been some subsequent activity your Honor may or
21 may not be aware of.

22 We recently attempted to get a preliminary
23 injunction within the last couple of weeks from Judge
24 Lagueur regarding payments by an Egyptian company,
25 Orascom, to the Palestinian Investment Fund, and without

1 getting into just, you know, an overwhelming amount of
2 collateral material, Judge Lagueux said that he would
3 not issue the preliminary injunction. He affirmatively
4 said that that does not mean he would not issue a
5 permanent injunction after hearing in January if we
6 could present evidence that the PIF -- excuse me, that
7 the PA was siphoning funds from the Palestinian
8 Investment Fund, which is one of the things we're trying
9 to prove here. We're also trying to prove that under
10 First Circuit case law a party who comes in and asks for
11 the vacatur of a default judgment must have clean hands,
12 and one of the considerations to deny vacatur is if the
13 party has acted with unclean hands. One of the things
14 we want to show is that after Judge Lagueux awarded the
15 stock ownership of the Palestinian Investment Fund to
16 the plaintiffs, took it away from the Palestinian
17 Authority, that notwithstanding that, the Palestinian
18 Authority paid to the -- excuse me, the Palestinian
19 Investment Fund paid to the Palestinian Authority all
20 kinds of money that we contend it shouldn't have, and
21 this was something that Judge Lagueux expressly referred
22 to as being something which might persuade him to enter
23 a permanent injunction. And, in any event, regardless
24 of the injunction issue, we think we're entitled to show
25 that these defendants have completely disregarded Judge

1 Lagueux's order of 2006 turning over the investment fund
2 to the plaintiffs, and that that alone -- by the way,
3 once that argument was made, that precipitated, in my
4 opinion, the recent motion to vacate the 2006 turnover
5 order because I think the defendants realized they have
6 some real peril if we can show that despite the
7 creditor's bill judgment in our favor, they have
8 disregarded the fact that we're the owners. Now that's,
9 your Honor -- I'm not trying to persuade you that we win
10 on that. It's a big issue, but it's an issue we would
11 like to be able to present Judge Lagueux with evidence
12 that there have been many many many millions of dollars
13 turned over from the PIF to the PA after the transfer of
14 ownership to the plaintiffs, and so we're asking at an
15 absolute minimum that we get the records of those
16 payments.

17 Now in response to that, they've incorporated
18 their general objections and they said defendants do not
19 intend to produce any documents in response to this
20 request, and --

21 THE COURT: Which request is that again,
22 Mr. Wistow?

23 MR. WISTOW: That relates to all of these
24 requests.

25 THE COURT: Give me a number.

1 MR. WISTOW: 10.A to Q.

2 THE COURT: Okay, thank you. Mr. Wistow, I need
3 to tell you that I can probably give you 15 more minutes
4 total, so you may want to hit high points. I have read
5 your memo.

6 MR. WISTOW: Okay. Fair enough.

7 THE COURT: And I think I've read it twice, in
8 fact. I think I've read all the memos twice, but I just
9 want to alert you, I'll give you 15 more minutes, hit
10 the high points that you'd like.

11 MR. WISTOW: I will, your Honor. This is an
12 painful for me as it is for you, I think.

13 In any event, 13.H through F, the Israeli
14 proceedings, one of the big arguments that has been made
15 before this Court and before the circuit is that the
16 defendants represent immature quasi-governmental group,
17 unsophisticated, didn't know how to handle these things,
18 the suit here, and that's one of the reasons they got
19 defaulted. We would like to show, and we have reason to
20 believe this is absolutely true, that in the -- there
21 were many Israeli suits brought against the PA and the
22 PLO under Israeli law for terrorist activities, and that
23 the PLO and the PA had no trouble defending those cases,
24 participating in discovery, and not getting defaulted,
25 and one of the things we want to show ultimately is the

1 reason that they defaulted in this case is because they
2 felt there was never going to be an opportunity for the
3 plaintiffs to ever collect anything, regardless of what
4 the result was. They knew that an Israeli judgment,
5 because of the occupation of the west bank and Gaza,
6 would be collectible against them. So we want to show
7 that they adequately defended those cases.

8 There's a very specific document we would like,
9 and I think this shows you the approach of the
10 defendants generally to this, it's 13.BB, and it's a
11 specific affidavit of a Muhannad Jaouni dated 2/22/05.
12 It was introduced in an Israeli case. And that relates
13 -- I'll read you what it says. An authentic copy of the
14 affidavit of Muhannad Jaouni dated February 22, 2005
15 submitted by the PA in the Jerusalem District Court in
16 Civil Case so and so, and it identifies it, and they've
17 taken the position that they're not allowed, among other
18 things, they're not allowed to produce this document.
19 It's inconsistent with Israeli law and procedure. We
20 supplied an affidavit from a professor, Israeli law
21 schools, indicating that the law in Israel is virtually
22 identical to the law here in the United States, that if
23 the PA or the PLO goes to its lawyer, goes to its lawyer
24 and says give me a copy of my file, the lawyer must do
25 it, and this is the affidavit of Professor Lipschits.

1 The lawyer must provide the documents. In fact, it's a
2 violation of the disciplinary rules in Israel. It's an
3 exact perfect corollary of what we have here. So we're
4 asking for that affidavit.

5 Similarly, another specific is the Fayyad
6 resignation, which is referred to in 14.A, and they
7 refuse to give us that, and we think that the Fayyad --
8 Fayyad is the present prime minister of the Palestinian
9 Authority. He was the finance minister during much of
10 the period we're talking about, and we think that
11 resignation letter is going to be vital in terms of
12 showing participation between the PA and the PLO, and we
13 don't understand why we can't get it.

14 I skipped over some other things. This is --
15 your Honor has read it, and I leave it to your Honor to
16 decide the relevance and the importance of these
17 matters. I understand, your Honor, that there's a fair
18 amount of work to get this stuff together on the part of
19 the defendants. I don't suggest that this is an
20 overwhelmingly simple task, although it is for some of
21 the items like the affidavit and the letter of
22 resignation, and also the records of payments that the
23 PIF made to the PA. That should be simple. The others,
24 I agree, requires some effort, but let's look at the
25 context of this. These defendants are in this court

1 saying please relieve us from \$116 million judgment, and
2 let us go forward and do a trial. And we say before you
3 do that, let's go through these steps. Let's take the
4 effort and produce the documents. Agree there's an
5 effort involved. And I think it's warranted.

6 THE COURT: Thank you, Mr. Wistow.

7 MR. WISTOW: Thank you, your Honor.

8 THE COURT: Mr. Hill.

9 MR. HILL: Thank you, your Honor. Let me start
10 with a big picture point which is this, the arguments
11 that have just been made to your Honor about why these
12 materials need to be produced were never made to me in a
13 meet and confer with the plaintiffs lawyers. We
14 attempted to confer with them about these requests
15 before the date of our response, and Mr. Wistow told us
16 he didn't want to talk to us. He would only deal with
17 us in a letter, so we wrote him a letter, and in
18 response to that letter, they removed six of the 205
19 requests and tweaked the rest. We served our responses
20 on September 27th. Subsequently, Mr. Strachman
21 reflected that we have a meet and confer about our
22 responses, and Mr. Wistow did not participate in that
23 conversation, but I spoke with Mr. Strachman. During
24 that conversation, none of the issues that were raised
25 in this motion were discussed with me. There has never

1 been a meet and confer between the parties about the
2 substance of the motion that is before you today, and I
3 think more importantly, that conversation with
4 Mr. Strachman took place before we had the arguments in
5 late October, and before your Honor issued the order on
6 the Rule 30(b)(6) deposition. And after your Honor
7 issued that order, which as they acknowledge, it
8 substantially narrowed the topics that the Court thought
9 were appropriate for discovery, we never had a
10 conversation about what if anything we would do in
11 response to that order as it relates to these requests.
12 Now I think the fact that we never had that conversation
13 is reflected in what is frankly a waste of the Court's
14 time on some of the issues that have just been argued to
15 you. And I'll just pick a couple of low hanging fruit.
16 One is request 14.A. Your Honor, if I may, I did what
17 the plaintiffs didn't do, which is what is required by
18 the local rule, I actually exerted the requests and the
19 objections, and I have them here. I'd like to hand them
20 up to the Court because I think your Honor needs to look
21 at these requests. May I do that?

22 THE COURT: You may.

23 MR. HILL: I have copies for counsel, as well, if
24 you'd like them.

25 Request Number 14.A on the exhibits that I just

1 handed your Honor, on page 72, and that says they
2 request an authentic copy of the letter of resignation
3 referred to by Salam Fayyad on pages 289 to 292 of the
4 transcript of his July 28, 2010 deposition. This is
5 actually a reasonable request. It's very specific. And
6 if you look at our response, we say defendants state
7 they will produce a document responsive to a reasonable
8 and proper scope and interpretation of this request.
9 And what's really extraordinary is that we did. And it
10 was in the production that we made on September 27th.
11 Mr. Strachman subsequently asked me to provide an index
12 of my production, and I gave it to him, and in that
13 index -- I'm trying to put my hands on right now. This
14 is in the record as Exhibit 17 to our opposition brief,
15 which is document number 610. On page 2 of that
16 document, I don't know if your Honor is trying to find
17 it. I'll wait. On page 2, in the left-hand column, we
18 list 3 RPD 14(a) and we list the bates range, page 12158
19 to 12159. That is the two page resignation letter of
20 Prime Minister Fayyad, and so it's extraordinary to me
21 that even in oral argument Mr. Wistow is suggesting to
22 the Court that we didn't produce it and asking that I be
23 ordered to produce it when the fact of the matter is I
24 did produce it on September 27th, and, you know, it's
25 just extraordinary to me that Rule 37 requires the

1 parties to get together and have a conversation to try
2 and narrow discovery disputes before the Court is asked
3 to rule on them, and everything I've said about this for
4 the last few minutes has been a complete waste of
5 everyone's time, and that's just one example. Let me
6 give you another one.

7 The plaintiffs have moved to compel on both their
8 requests 9.A and 9.B and their requests 13.V and 13.W,
9 and if you look at request 9.A, which is on page 18 of
10 the exhibit I just handed your Honor, and to keep your
11 thumb there, and then find 13.V, which is on page 48 of
12 that same document --

13 THE COURT: Are you saying V as in Victor?

14 MR. HILL: V as in Victor. 13 Victor on page 48,
15 and you compare 13.V with 9.A, you'll see they're
16 exactly the same thing. So they've moved to compel on
17 two identical requests. And again, if they had just
18 bothered to have a phone conversation, we wouldn't have
19 wasted time briefing this issue. There's no point in
20 moving on two identical requests. And let me give the
21 Court one more example.

22 If the Court will look at request number 14.F.i,
23 I'm sorry, 14.F(iii), so it's 14.F.iii, this is on page
24 97 of the document I just handed up, this asks for all
25 documents related to, referring to, and/or evidencing

1 any and all positions, titles and/or jobs held by Amin
2 Al Hindi in the PA or the PLO on the date that you
3 produced documents in response to this request. So this
4 would have required us to provide documents related to
5 Mr. Al Hindi's jobs, essentially, as of September 27,
6 2010. Well, Mr. Al Hindi died on August 17, 2010. So
7 this is a request to provide the current job of someone
8 who's deceased. This is something they need to compel
9 on. And again, if they'd just complied with the rule
10 and had a substantive conversation with us about the
11 arguments they're now making about the requests they're
12 now seeking to have us ordered to produce documents in
13 response to, we wouldn't have wasted everyone's time
14 litigating 14.F.iii.

15 Now, more examples, and I'll reference them as I
16 talk about these individual requests, but I wanted to
17 say at the outset this is not the way you're suppose to
18 do this. We're not suppose to waste your Honor's time
19 and the parties' time briefing a motion on things that
20 can get resolved in a phone call between counsel. And
21 the case law is very clear, that that is the basis alone
22 to deny the motion, and I would request that the Court
23 do that. Now unless the Court's prepared to do that
24 right now, I, of course, need to go on and address the
25 merits, and I'll do that.

1 THE COURT: Please do.

2 MR. HILL: And the second point I want to make is
3 there is also a failure to comply with the local rule,
4 which is local rule 37(a), and I know the Court is
5 familiar with it, but I think it bears reading it into
6 the record, which is, a motion to compel a response, or
7 further response to an interrogatory request for
8 production or request for admission shall state the
9 interrogatory or request, the response made, if any, and
10 the reasons for why the movant maintains the response is
11 inadequate. That's not been done here. And, frankly,
12 it makes it very difficult to respond to the arguments
13 that are made, and I know it makes it difficult for the
14 Court. I have just handed you the hundred pages of
15 requests that are at issue and the responses that are at
16 issue. That is how much thicker the opening briefs
17 should have been had the local rule been complied with.
18 And I'm going to take your Honor through, if not all of
19 these, a vast majority of them in the course of this
20 argument because I feel I have to have you look at the
21 language that you're being asked to order my clients to
22 comply with, and the plaintiffs want your Honor to do
23 this at 20,000 feet and just say, oh, well, there's some
24 categories here, there's some categories there, but the
25 fact of the matter is the language of the requests

1 matter, and that is the language that we've made
2 objections to, and so the notion that the plaintiffs can
3 just say, oh, well, generally this topic area is
4 relevant therefore you should compel the following 22
5 specific requests, that just can't work that way. We've
6 got to work through the details and determine whether
7 these are proper in scope, whether they call for
8 privileged information, if they do, whether I should be
9 required to produce a privilege log. Let me make this
10 big point, a lot of these are for all documents relating
11 to a general category of material, including in some
12 instances all documents related to blah, blah, blah,
13 this action. Well, Judge, that literally requires me to
14 log everything in my office about this case, and that is
15 not reasonable. There's no reason for that. And if I
16 sent them a document request that said produce all
17 documents related to this case, they would object and
18 say it's ridiculous, it includes a ton of
19 attorney/client and attorney work product, and I've made
20 those objections. But the arguments the plaintiffs are
21 making is, oh, no, you should just order them to produce
22 all that stuff. And so we're going to need to go
23 through these in some detail, and if your Honor is going
24 to order anything, your Honor is put in the unfortunate
25 position of having to basically blue pencil these

1 requests. And I was struck by one of the things
2 Mr. Wistow said in his argument which was there's a
3 mistake in the motion. I think it's with respect to
4 request 4.0, and he says there's an error, we're not
5 asking for all documents related to the action. But
6 when you look at 4.0, which is on page 5 of the exhibit
7 I handed to your Honor, it asks for authentic copies of
8 all PA cabinet minutes, protocol and/or records from
9 anytime referencing and/or relating to the judgment, any
10 proceedings brought to enforce the judgment, the 2006
11 judgment, and/or the instant action. And, again, if we
12 had a meet and confer, and he said, you know what, I'm
13 not asking for everything about the case, I'm just
14 asking about the judgments, well, that would have
15 substantially narrowed this request. Now in this one,
16 it turns out to be a no set because there aren't
17 anything even to the broader ones, but as you'll see as
18 we go through these, this is a consistent problem
19 throughout these document requests. They are requesting
20 in here that literally, if read, require every document
21 that has Salam Fayyad's name on it. There are documents
22 in here that literally, if read, require me to log every
23 document in my office related to this and, frankly, it's
24 not fair to the Court to require you to now take a blue
25 pen to these and make them reasonable. You should

1 require the parties to have done that before we get here
2 several weeks after the close of discovery on a motion
3 to compel 90, really discount the duplicates, 88
4 document requests. So I think independently the failure
5 to comply with the local rule and produce for your Honor
6 in a way that's easy for your Honor to utilize the
7 actual requests and the actual responses is another
8 basis on which to deny this without even reaching the
9 individual merits. But I understand the Court wants me
10 to proceed with the argument, and I'll proceed to the
11 individual merits at this point.

12 THE COURT: Just so you won't be surprised,
13 Mr. Hill, I'm going to let you begin, because I let
14 Mr. Wistow begin and go on awhile with each individual
15 request, but I'm going to limit you to about the same
16 amount of time Mr. Wistow had. I doubt that you'll get
17 through all of these, so I'm going to let you go, but
18 you're not going to get through all of them, I don't
19 think, unless you speak extremely fast.

20 MR. HILL: Well, your Honor, I will obviously do
21 as the Court complies. I'd ask that the Court note my
22 objection to that because I'm being -- your Honor is
23 being asked to incorporate these particular
24 constructions into an order, and I think before your
25 Honor can do that I should have the chance to argue them

1 all, and I will obviously try and meet the Court's
2 timing requirement. I appreciate this could take a long
3 time.

4 THE COURT: Well, it sounds to me, Mr. Hill,
5 you're suggesting I'm not being fair to you when I -- I
6 don't share that view. The Court's trying to be quite
7 fair. I'm going to let you go, but I generally balance
8 the amount of time allocated to each side on a matter,
9 try to be approximately equal, and I've allowed you to
10 submit documents to support your argument, including the
11 one that you've handed up this morning just now, and you
12 have your written argument, so I really don't think by
13 limiting you to approximately the same amount of time
14 that I allowed Mr. Wistow, I think that you're in any
15 way being deprived of a fair opportunity to be heard.

16 MR. HILL: I appreciate that, your Honor. I just
17 wanted to note the objection for the record. I will
18 follow the Court's direction.

19 THE COURT: Specifically, what are you objecting
20 to?

21 MR. HILL: Well, the problem, your Honor, is
22 there are 88 requests here, and you're being asked to
23 order us to respond to all 88 of them, and I'm just not
24 sure that in 15 minutes I can adequately address 88
25 requests. I haven't done the math but that's, you know,

1 20 seconds per request, or something like that, and some
2 of them are able to be grouped and connected in that
3 way, and I will do my best to address them all. I don't
4 want my client to be prejudiced because the plaintiffs
5 have chosen to move on 88 requests. So let me proceed
6 with --

7 THE COURT: I haven't limited you to 15 more
8 minutes, Mr. Hill.

9 MR. HILL: I understand.

10 THE COURT: I've indicated I'm going to allocate
11 to you the same amount of time, approximately, as
12 Mr. Wistow had, and that's all I've indicated to you. I
13 haven't cut your argument off. What I've done is to
14 give you the courtesy of letting you know that you're
15 probably in that amount of time not going to be able to
16 get through all of these, and to allow you to know that
17 in advance so that if there are some that you think are
18 more important that you might want to address those
19 first. But other than the fact that I'm saying you're
20 not going to get significantly more time than
21 Mr. Wistow had, I'm not limiting your ability to argue
22 this motion, given the fact that I've accepted your
23 documents and I've read your memorandum. So with that,
24 please continue.

25 MR. HILL: Yes, your Honor. To address request

1 number 4.0 to V, which I believe begin on page 5, I
2 think these are actually relatively easily disposed of
3 because we've looked for these materials and there are
4 none, and so I don't see any reason why we should be
5 compelled to produce documents in response to 4.0
6 through V because we haven't found any. Now let me make
7 a distinction between 4.0 to R and 4.F to V, and if I
8 could call the Court's attention to 4.S. The problem
9 here is the breadth of the request. This requires all
10 minutes, protocols and/or records generated by any PA,
11 ministry, agency, department, division, bureau and/or
12 other government body from anytime referencing and/or
13 relating to the judgment, any proceedings brought to
14 enforce the judgment, the 2006 judgment, and/or the
15 instant action. So this is a very broad request. This
16 requires us to search everywhere in the PA for any
17 record generated by anywhere in the PA from anytime
18 relating to the case, and so let me first note it's
19 tremendous overbroad.

20 Secondarily, let me note that it calls for
21 privileged information. I mean, any records from the PA
22 that are communicated to my firm would be
23 attorney/client privilege. It would be unduly
24 burdensome for me to log all attorney/client
25 communications related to the case, but that is facially

1 what 4.S requires. We have, as we said in our response,
2 which is on the next page, page 10, we have looked for
3 and said we would produce documents containing
4 nonprivileged and nonprotected information. So again,
5 I'm not going to produce my attorney/client
6 communications, I don't have to, I shouldn't have to,
7 within our possession, custody or control, that are
8 responsive to a reasonable and proper scope and
9 interpretation of the request, and that can be found
10 through reasonable search efforts. And we have done
11 that. We have conducted a reasonable search of the PA
12 to try and find documents that are not privileged, that
13 are about this case, and to this point in time we have
14 not located any. And so I would respectfully ask that
15 we not be compelled to produce documents that we can't
16 find, or to log them all as privileged, which would be a
17 waste of everyone's time.

18 4.T is similar. It's just with respect to the
19 PLO as well as instead of the AP. 4.U is similar, and
20 this is on page 11 of the exhibit I handed to the Court.
21 It's a little different. Instead of looking for
22 minutes, protocols and records, now we're being asked to
23 look for decisions, orders and directives. But again,
24 it's decisions, orders and directives from anyone in the
25 PA relating to the case. And again, we've looked for

1 nonprivileged material and we're not locating any. If
2 we find it, we will produce it, but we respectfully
3 ought not be required to log anything our client has
4 written related to the case that's been an
5 attorney/client communication or that's been work
6 product anymore than the plaintiffs should be required
7 to log all of their attorney/client communications or
8 work product.

9 Let me move, sticking with Mr. Wistow's format of
10 moving through these in numerical order, let me move to
11 6.J through L. 6.J is located on page 13, and J, K and
12 L of request 6 are the same except for the alleged
13 contracting parties, so J is the PA, K is the PLO and L
14 is Fatah. And looking to J, all documents relating to,
15 referring to, and/or evidencing any communications and
16 written agreements, accords and/or pacts to which Hamas
17 and the PA were parties at anytime between September 1st
18 '93 and June 9th, '96. Let me make a point about
19 relevance, first of all.

20 Mr. Wistow suggested this was unquestionably
21 relevant to our meritorious defense. We have said this
22 in other discovery responses. Let me make it absolutely
23 clear, the PA and the PLO are not relying on any written
24 agreements, accords and/or pacts with Hamas to assert a
25 meritorious defense. The plaintiffs are relying on

1 these alleged pacts to assert our liability, okay? So
2 if the Court is going to limit discovery to our
3 meritorious defenses, these documents are not part of my
4 meritorious defense.

5 Let me make another point, and that's this, this
6 request as written requires communications and written
7 agreements, accords, and/or pacts, to which Hamas and
8 the PA were parties. We have conducted a search for
9 written agreements between the PA and Hamas, and we
10 can't find any. We don't think there are any. There
11 were written agreements between the PLO and Israel,
12 there's the Oslo Accord, but there aren't any treaties
13 between the PA and Hamas. Similarly, there aren't any
14 between the PLO and Hamas, and there aren't any between
15 Fatah and Hamas. So in the absence of any written
16 agreements, accords or pacts, if that's the
17 construction, and I suggest that that is the proper
18 construction since it's communications and written
19 agreements, and is different than or, so we're looking
20 for documents that is both a communication and a written
21 agreement. Since there are no written agreements
22 between these three entities and Hamas, there is nothing
23 that's responsive to these three requests. So that's
24 what this literally requires us to produce, and since we
25 haven't found any written agreements, there's nothing

1 that's responsive to this. Hypothetically, if there is
2 a written agreement, there's a problem because it
3 doesn't just ask for the written agreement, it asks for
4 all documents relating to it.

5 Now, your Honor will appreciate that when we got
6 this document request, we started looking for these
7 documents, and there is a fair amount of attorney/client
8 communication and attorney work product that relates to
9 trying to find these documents. Again, I shouldn't have
10 to log my efforts to comply with the document request
11 because they're responsive to the document request
12 because it's so overbroad. It's all documents relating
13 to a written agreement. Well, I went and looked for
14 one. I didn't find one. I shouldn't have to log all
15 the attorney/client communications and attorney work
16 product that went into the effort of finding out that we
17 don't have one. So I'd respectfully request that the
18 motion be denied with respect to the sixes.

19 THE COURT: All right, Mr. Hill, have you
20 finished on the sixes?

21 MR. HILL: I'm done with the sixes, yes, your
22 Honor.

23 THE COURT: All right, it's 12:31, we're going to
24 break for lunch at this point. We'll resume at
25 2 o'clock. The Court will stand in recess.

1 (RECESS)

2 THE COURT: All right, Mr. Hill, you may resume
3 when you're ready.

4 MR. HILL: Thank you, your Honor. Good
5 afternoon. I have endeavored to try and streamline this
6 as much as possible. There are four areas I need to
7 cover which for lack of a better title we could call the
8 nines, the tens, the thirteens and the fourteens, though
9 there's several of some of them. Let me start with the
10 nines and start with 9.A and B, which if your Honor
11 still has the truncated versions, on page 18 is 9.A, and
12 9.A and B are the same except one is directed to the PA
13 and the PLO.

14 So, a couple of points we make here. First of
15 all, just the time frame, the request is between '93 and
16 December 2007. I understood Mr. Wistow to say they
17 would like to narrow that to 2000 to 2006. We wouldn't
18 have any objection to narrowing it, however, what I
19 think is, when you read the request, there's also not
20 going to be anything responsive to this, and I'll
21 explain why. It says all documents relating to,
22 referring to, and/or evidencing, and then there's a list
23 of things that these documents have to relate to, refer
24 to, or evidence. One, the organizational, and two,
25 institutional structures, and three, individuals within

1 the PA responsible for, and again there's another list,
2 1, monitoring, and 2, making decisions regarding
3 lawsuits filed against PA in, and they got another two
4 things, in, 1, the United States, and 2, in Israel. So
5 this is a document that's got to have all of these
6 things in it, and I don't believe there is such a
7 document, and let me explain why. Let me do that in the
8 context of the next set, which is 9.U and 9.V.

9 9.U, again these are the same except for the 9.U
10 is the PA and 9.V is the PLO, and 9.U, which is on page
11 20 of the document that I believe your Honor is looking
12 at, requests for all documents from anytime prior to
13 December 2007, again, I'm assuming this has now been
14 narrowed to 2000, relating to, referring to, evidencing,
15 containing and/or constituting policies, procedures
16 and/or guidelines for the handling of lawsuits brought
17 against the PA. Now this one is broader because it's
18 not limited to lawsuits in the United States or Israel.
19 But I don't think there is a relevant document
20 constituting policies, procedures, and/or guidelines for
21 handling lawsuits brought against the PA.

22 Let me talk about the prime minister's testimony
23 because that's what Mr. Wistow referenced. The prime
24 minister was examined at some length about whether there
25 were policies and procedures of the PA that would be

1 involved here, and the examination starts on page 230 of
2 his deposition and runs to page 256. I'm not going to
3 read it all. But let me make this point, and it's this,
4 and this is -- by the way, it's in the record. It's
5 Exhibit D to the motion to compel that we're discussing
6 now which is document 484-9, and I'd like to start on
7 page 238. 238, line 5, there's a question: Mr. Fayyad,
8 the minister of justice follows up on what? Frankly, I
9 don't understand. In the Ungar case, what is his
10 involvement? Answer: You know, generally speaking, in
11 all litigation against the PA, or in which the PA is a
12 party, to which the PA is a party, the minister of
13 justice is involved in that sense. Domestic or
14 international, now in the case of Ungar and the other
15 litigation cases against us in the United States, the
16 minister of justice is not involved in decision-making.
17 Okay.

18 If you would, your Honor, I would like to draw
19 your attention to page 241, starting at line 14. The
20 question is: I get the impression that one of the
21 functions of the ministry of justice for these kinds of
22 cases is that --

23 THE COURT: Excuse me, Mr. Hill, for some reason
24 my page numbers don't seem to correlate with yours. I'm
25 looking at the page number at the bottom, 241, I also

1 see at various points different page numbers, so it must
2 be other page numbers that you're referring to.

3 MR. HILL: Exactly, your Honor. I apologize
4 about that. It's the nature of the exhibit.

5 THE COURT: You're at 241?

6 MR. HILL: I'm at 241, line 14 of the smaller
7 pages, if you will.

8 THE COURT: Yes, okay.

9 MR. HILL: Okay. So question by Mr. Wistow: I
10 get the impression that one of the functions of the
11 ministry of justice to these kinds of cases is that,
12 say, request for production of documents or request for
13 answers to interrogatory, are initially worked on by the
14 minister of justice department, certainly not by you,
15 right? Answer: In general. In general, this is the
16 case, however, in this particular case, as in the other
17 cases being litigated in the United States, you know,
18 the process goes through my office. Whether it's a
19 document that's required, an individual being deposed,
20 or any other thing that is of interest to the attorneys,
21 the Court, generally, the request comes to my office and
22 then it goes to, you know, the head of the department
23 concerned, and if it's individual, you know, they
24 appear. If it's a document, they produce it if it's
25 available. Next question, 242, line 8: So the minister

1 of justice has not been involved in these cases?

2 Answer: In these cases did not have that involvement

3 which the ministry of justice generally has in cases of

4 litigation. So, let me just make a comment here. So

5 the prime minister is saying in the U.S. litigation it's

6 the prime minister's office that makes the decision, not

7 the ministry of justice. The ministry of justice is not

8 involved. Then if you jump ahead, there's a line of

9 questioning about litigation more generally. Okay. So

10 if your Honor would look at page 248, starting at line

11 5, there's some discussion about a hypothetical lawsuit

12 filed against the PA. It says, okay, so there's no set

13 policy. It's up to you to decide who would get it, is

14 that fair? Answer: Now I can tell you there is a policy

15 in the sense of there are ministries with clear mandates

16 and agencies as to what they're suppose to be doing.

17 What is not really established, what is not there, is

18 established pattern, practice, tradition, but not policy

19 or mandate. Next question, 248, line 19: Is there any

20 written policy, procedure, protocol, or whatever you

21 want to call it, that tells the people who work for the

22 PA where to send any kind of lawsuit, any kind? Answer:

23 You know, there is. Of course there is. For example,

24 there are cases, you know, filed against us in local

25 courts, meaning courts in the west bank or Gaza, on a

1 variety of matters. What happens is that the attorney
2 general, prosecutor general, acting on behalf of the PA,
3 informs us, informs the relevant agency of the executive
4 branch and of the existence of an action against it,
5 then he would ask in that communication as to what
6 response that agency may have to that particular
7 complaint that's been filed against the PA of any
8 proceeding that's been filed, et cetera, et cetera. So
9 there is a written policy? Answer: Yes. Insofar as
10 that case is concerned, there is. So it's clear when
11 you read the testimony, and of course the Court is free
12 to read this entire exchange, that when the prime
13 minister is talking about a policy, he's talking about a
14 policy that exists for local actions filed against the
15 PA and Palestine. And so therefore when we return to
16 the request at issue here, 9.A and 9.B are about actions
17 in the United States or Israel. Obviously, this policy
18 would not be responsive to those requests. So that
19 leads us to 9.U and 9.V which generally asks for any
20 lawsuits against the PA, but I would submit that the
21 policy about what the PA does when it's sued in the west
22 bank is not going to be relevant here, and I think the
23 plaintiffs agree. If you look at the last -- 13, I
24 believe it is, yeah, so on page 71, 13.VV as in Victor,
25 page 71 of the document request, the exhibit that I

1 handed up earlier today, page 71, your Honor, it asks
2 for all documents relating to, referring to, or
3 evidencing any legal or arbitration proceedings other
4 than those explicitly referred to in this request for
5 production brought by or against the PA and PLO at
6 anyplace outside the west bank and Gaza Strip at anytime
7 prior to December of 2007, and so the plaintiffs own
8 requests don't appear to be asking for Gaza and west
9 bank litigation, I can't imagine that it would be
10 relevant. So with that understanding, I don't believe
11 there are responsive documents to 9.A, 9.B, 9.U or 9.V,
12 if they're construed literally. Now if they're
13 construed in an overbroad fashion, your Honor could see
14 that there could be many many documents about, as
15 Mr. Wistow put it in his argument, who's monitoring the
16 litigation. I mean, since 2007, my firm has been
17 monitoring the litigation. So if it means to encompass
18 all the litigation documents, then we're back into the
19 same posture of not needing to log all the litigation
20 documents. So I think either way, when you read it
21 literally, there are no responsive documents, and I
22 would ask the Court not to construe it in an overbroad
23 way that would make us log things.

24 I think I'm going to talk about the tens. The
25 tens pertain to the Palestine Investment Fund. And I

1 note, as your Honor is aware, that we have appealed your
2 ruling on the relevance of PIF communications. I won't
3 reargue that issue here. So with that ruling and
4 background, let's talk about whether these particular
5 requests are things that we should be compelled to
6 produce documents in response to. 10.A, which is on
7 page 23 of the handup, asks for all documents relating
8 to, referring to, and/or evidencing the relationship
9 between the Palestinian Investment Fund and the PA.
10 This conceivably is any document the PA has that talks
11 about the Palestine Investment Fund. Conceivably any
12 document would relate to the relationship, and if you
13 look at the definition that the plaintiffs have put on
14 relating to, it is, as the language is by itself,
15 extremely broad. This is on page 31 of the document
16 request. Relate to, or relating to, shall mean and
17 include constituting, discussing, mentioning,
18 containing, embodying, reflecting, identifying,
19 incorporating, referring to, dealing with or pertaining
20 to in any way. So I think literally the overbreadth of
21 this is everything that says PIF on it, and clearly that
22 wouldn't be a reasonable request. I would note that
23 they already have the PIF articles of incorporation.
24 They already have PIF's annual reports, which discuss
25 this very issue. So I don't believe the plaintiffs have

1 met their need to showing that the need for additional
2 information about the relationship between the PA and
3 the PIF would outweigh the burden of this particular
4 request, and I don't know that the Court needs to try
5 and fashion a narrower request that would be reasonable.
6 I just ask you to deny the motion to compel on this one.

7 10.B, which is on page 24, again, this one asks
8 for all documents relating to, referring to, and/or
9 evidencing the PA's knowledge of, and when the PA first
10 became aware of the 2006 judgment. This is the
11 September 19, 2006 creditors' bill judgment. Again, on
12 the one hand it seems very narrow because, as I think
13 Mr. Wistow noted at the November 17th hearing before
14 Judge Lagueux, Mr. Sherman was in the courtroom when
15 Judge Lagueux announced this from the bench, and so in
16 that sense the PA first became aware of it because
17 counsel heard about it in court. So if all we're asking
18 for is all documents relating to when the PA first
19 became aware, they've got the transcript. They've got
20 it already. If they're asking for something else, and
21 it's not clear what they are asking for, you know, it
22 sounds like it's going to, at the very least, involve
23 attorney/client communications between Mr. Deming and
24 the clients. So I don't think there's a basis to compel
25 us to log all communications with the clients from

1 September 2006 about the creditors' bill judgment. And,
2 for what it's worth, we're not contending that the PA
3 didn't know about it contemporaneously. No argument
4 that we weren't aware of it. We obviously were aware of
5 it by operation of law when our counsel heard about it
6 from the lips of the Court.

7 10.C is all documents relating to, referring to,
8 and/or evidencing the transfer, and/or payment of any
9 funds, monies or assets, from the PIF to the PA from the
10 date the 2006 judgment was entered until present day.
11 Let me stop there. Actually, the second one is
12 including all documents relating to, referring to,
13 and/or evidencing in the amounts of such transfer. So
14 this is every document that the PA or the PLO has about
15 any transfer from the PIF to the PA from 2006 to the
16 present. I would submit the objection to overbreadth
17 ought to be sustained here. There's no effort to try
18 and narrow out what they already know about in the
19 motion, in the opposition they filed to our motion for
20 protective order on PA, PIF communications. They
21 included in the record several documents that are
22 publicly available that show such transfers. There's
23 been no showing that we need to go, turn over every
24 stone in the PA and produce every document showing every
25 transfer for this time period. They have that evidence

1 already.

2 THE COURT: They have a record of every transfer
3 between the PIF and the PA?

4 MR. HILL: I don't know that I can represent that
5 they have the record of every transfer, your Honor. I
6 hesitate to make that representation.

7 THE COURT: So all you can say is they have some?

8 MR. HILL: Well, and I guess the point I would
9 make is, isn't some enough? I mean, if the issue is
10 that the transfers themselves are somehow evidence of
11 unclean hands, or bad faith, or however you want to
12 characterize it, I mean, I obviously disagree with those
13 characterizations, but they have evidence of millions of
14 dollars of transfers already. So if there is, you know,
15 if we turn the PA upside down and find additional
16 transfers, I don't know it's going to add anything to
17 the plaintiffs' argument that there were transfers. The
18 transfers are either, you know, proper or not, and Judge
19 Lagueux will decide that in some context, I suppose, but
20 there's no need for us to go searching every drawer in
21 the PA to find every document relating to every transfer
22 from 2006 when they've already got substantial evidence
23 that such transfers had taken place.

24 10.D is related. 10.D asks for all documents --
25 I'm on page 26, your Honor. This one was amended, so

1 the corrected one is on page 26. All documents relating
2 to, referring to, and/or evidencing all decisions to
3 carry out the transfers and/or payments. I'm not sure
4 what this adds, referred to in the previous section C,
5 including, but this is a big addition, all documents
6 evidencing the name, title and present whereabouts of
7 any person involved in making, participating, and/or
8 authorizing such transfers and/or payments. Again, this
9 is one that is spaciouly overbroad. It would require
10 us to, first of all, figure out who was involved, but
11 then we have to give them every document that has that
12 person's name on it regardless of whether it has any
13 bearing on the case. That's what it literally calls
14 for.

15 THE COURT: Mr. Hill, you have 10 minutes,
16 maximum.

17 MR. HILL: Your Honor, I will try and expedite
18 myself. 10.E, all documents constituting the PIF
19 investment fund, articles of association, and/or bylaws.
20 I believe they already have them. I'm not sure why we
21 need to be compelled to produce them, and they should go
22 get them from the PIF, not from us.

23 10.F, all documents relating to, referring or
24 evidencing the PIF's governing structure and
25 decision-making procedures. Again, they should get them

1 from the PIF, and they already have the articles of
2 association. I'm not sure what more they need to prove
3 that issue.

4 10.G is all documents relating to, referring or
5 evidencing any efforts to change the articles of
6 association of the PIF on any date subsequent to the
7 judgment. Again, they have the amended articles. They
8 ought to get them from the PIF rather than from us, and
9 again, this one has the same overbreadth problem as, I
10 forget which number it is, but they ask for every
11 document with the name of any person involved. So, if
12 hypothetically, President Abbas was at the meeting where
13 they were adopted, then I'd have to give them every
14 document that has President Abbas' name on it under
15 literal construction of this request.

16 The next one, 10.J, asks for all documents
17 related to, referring to, or evidencing all actions
18 carried out by Mohammad Mustafah on behalf of the PA and
19 all services rendered by Mohammad Mustafah here on
20 behalf of the PA between July 2004 and the present day.
21 Again, I don't know why July 2004 would be relevant.
22 Even under the plaintiffs' theory, it would be September
23 2006 that would be relevant. But again, why do we need
24 every document about what Dr. Mustafah has done for the
25 PA? There's no showing that that burdensome, you know,

1 search for every document that has Mustafah's name on
2 it, is justified for the discovery that they claim to
3 need.

4 And then let me deal with 10.K in the context of
5 the Israeli proceedings. 10.L, which is on page 32, is
6 documents relating to legal actions brought against
7 Orascom by PIF, and 10.M is papers in those cases
8 brought against Orascom by PIF. Again, the plaintiffs
9 have cases against both Orascom and PIF. They can get
10 those materials from those nonparties. I don't know why
11 they need to get them from us. I also note that your
12 Honor previously denied their request for communications
13 between us and Orascom on the theory that it wasn't
14 relevant, so I don't know why this would be anymore
15 relevant than the communications that counsel for the PA
16 had with Orascom that you previously denied the motion
17 to compel on.

18 I believe I'm now ready to talk about the
19 thirteens. Okay. And the whole series of these,
20 starting with -- I'm sorry, 13.A is again the same as I
21 think 10.B, when we first became aware of the creditors'
22 bill proceeding. We became aware of it when Mr. Sherman
23 got a copy of the creditors' bill. There's no need for
24 any further discovery on that.

25 So, starting on 13.H, there's a whole series that

1 deal with the Israeli proceedings, and let me just make
2 a general point about these rather than going through
3 them individually. So there is a procedure under
4 Israeli law to get these materials from the Israeli
5 courts, and that procedure requires the parties to be
6 informed of that and have a say about whether a nonparty
7 should get them, and I think the appropriate thing for
8 the Court to do is, well, first of all, not allow this
9 because it's not relevant. I mean, you're talking about
10 seven years of litigation in Israel in other cases. I
11 just can't fathom that those documents are going to be
12 exhibits in January, or if they are, very many of them
13 could possibly be. So it's a tremendously burdensome
14 request. There's an affidavit in the record from the
15 defendants' Israeli lawyer that says it's going to take
16 200 hours of time to sort through and make this document
17 production. I note that your Honor previously denied
18 the plaintiffs' request to take a 30(b)(6) on this very
19 issue of the Israeli litigation, so I don't know why it
20 would be appropriate for us to have to produce hundreds
21 or thousands of documents from other cases in Israel if
22 we didn't have to produce a witness to talk about the
23 other cases in Israel. I think your Honor has already
24 ruled on the relevance of this to a certain extent.

25 I'd also note that, you know, the plaintiffs had

1 Israeli counsel, some of which are counsel in these
2 other cases. It's my understanding that the plaintiffs'
3 Israeli lawyers represent other plaintiffs in Israeli
4 cases in thirteen cases against the PA and PLO. They
5 obviously already have that information through their
6 own counsel, and if there is no prohibition under
7 Israeli law in sharing it, I don't know why they'd need
8 us to produce it again. They've clearly got a
9 relationship with the affiant attached to their motion,
10 Mr. Roth, at Exhibit E, who described some cases he's
11 brought against the PA and the PLO. I don't know why
12 they couldn't get the material from him as opposed to
13 from us.

14 Let me make one point about a very specific
15 request, which is 13.BB, I believe, which is on page 51
16 of the exhibit I gave your Honor.

17 First of all, I need to make a correction to our
18 brief. We said in our brief that this had been marked
19 as an exhibit at a preliminary injunction hearing by PA,
20 PLO counsel. That is a mistake. It was not. In fact,
21 a different affidavit was marked by Mr. Wistow, so that
22 should be stricken from page 26 of our opposition brief.
23 But the point is, this is so clearly described that I
24 have a strong suspicion the plaintiffs already have it,
25 and in fact, it's my understanding that the plaintiffs'

1 Israeli lawyer is the lawyer representing the plaintiffs
2 in this case that's described here in 13.BB. And if
3 they don't have it, Judge, I'll give it. I'll give them
4 this one. This one is specific enough. We can go find
5 it. But the notion that we need to produce all of the
6 material from those other cases, I think, is
7 inappropriate.

8 The other thirteen all pertain to other old
9 American litigation. So there's the Achille Lauro case,
10 there's the PA, there's the PLO, US vs PLO case, there's
11 the Mendelson case, there's the Danish road contractors
12 arbitration proceeding in Europe, there's the Beucheit
13 case. Your Honor didn't allow deposition, 30(b)(6)
14 deposition testimony on these topics. These are other
15 old litigations. They're not likely to lead to relevant
16 evidence that's going to justify the burden of requiring
17 us to go search old files and produce these old
18 materials. And as the plaintiffs acknowledge, in
19 substantial part, these materials are publicly
20 available, anyway. If it's really important to know
21 what orders were entered in the Achille Lauro case, they
22 can go get them from the court that handled the Achille
23 Lauro case, and they ought to do so.

24 I believe I'm now ready to talk about the
25 fourteenth, which is my last topic, and these are

1 similar. They are parallel requests relating to four
2 individuals, Mohammad Dahaln, Jabril Rajub, Tofee Tirawi
3 and Amin el Hindi, and let me get to the first one which
4 is on page 73 of my handout, request number 14.B.1, and
5 the problem with all of these is that they're
6 tremendously overbroad, and we've given them the
7 documents sufficient to show what they claim they want
8 to know. This 14.B.1, I'll just use as an example, all
9 documents relating to, referring to, and/or evidencing
10 any and all positions, titles and/or jobs held by
11 Mohammad Dahaln in the PA and/or PLO between January
12 1st, '97 and June 6th, '96. This facially calls for
13 every document, every business document, at least, that
14 has Mr. Dahaln's name on it, because any of those would
15 relate to his job. This would be like asking for any
16 documents that relate to Brian Hill's job from my law
17 firm. You'd have to give them everything with my name
18 on it. It's tremendously overbroad. But the point is,
19 if the issue is what job he had at the time, we already
20 produced sufficient information to them to establish
21 that, and we've never had a meet and confer where
22 they've told me, you know, I don't know what he was
23 doing between June and July of '95. If they ask me
24 that, I would tell them. And, in fact, I think a good
25 example of this is, Mr. Dahaln, who's on our witness

1 list, and we're planning to have him testify in January,
2 we initially thought he wasn't going to make it. We've
3 noticed his deposition. I got an email from
4 Mr. Strachman saying is Mr. Dahaln currently an officer,
5 director or managing agent of the PA or PLO, and I wrote
6 him back, I think the same day or the next day and said
7 no, he's not. So if the issue is were they officers at
8 the time, what's their officer status today, they're are
9 a lot less burdensome ways to get at that information
10 than producing every document that's got Mr. Dahaln's
11 name on it.

12 May I just confer with my colleague to make sure
13 I didn't overlook anything, your Honor? I may be at my
14 time limit, anyway.

15 THE COURT: You may. Have you concluded,
16 Mr. Hill?

17 MR. HILL: I think I'm done. Thank you.

18 MR. WISTOW: May I have just a few moments, your
19 Honor?

20 THE COURT: You may, Mr. Wistow.

21 MR. WISTOW: Thank you. I want to say first of
22 all --

23 THE COURT: Mr. Wistow, I'll try to be as close
24 as I can on this. You have a maximum of ten minutes.

25 MR. WISTOW: I won't take that. And I don't mean

1 to impose on your Honor's patience. I want to make
2 clear why -- Mr. Hill indicated that he tried to speak
3 with me, and I told him please put it in writing, and
4 your Honor will recall that I was anonymously admonished
5 by the Court for using vulgar language that was quoted
6 in a letter, and I'm certainly not going to repeat the
7 vulgar language, but it was a phrase that concluded with
8 an accusation that Mr. Hill was a liar. I'm sorry to
9 bring this up, but he brought up the subject of why I
10 insisted on a letter from him. I felt that he had made
11 a commitment to me orally, and completely breached it,
12 that's why I used that vulgar phrase that he quoted to
13 your Honor, and that's why I insisted on a letter.

14 Now, if you listen to Mr. Hill's argument, he's
15 taken everything we've asked and reduced it by the
16 process of (inaudible). There's literally nothing we've
17 asked for with one or two exceptions that isn't too
18 broad. If he keeps saying to the Court that he doesn't
19 have certain items, if he would just state categorically
20 in response to the items that we moved to compel that
21 they don't exist, we would not pursue, and would not
22 have pursued those items here. We would not.

23 Now he tells us that Al Hindi, for example, died,
24 I believe he said on August 17, 2000, I don't read the
25 obituaries in the west bank, or Gaza, or wherever he is,

1 and he could have at least dropped us a letter, or done
2 something, to tell us that Al Hindi had passed away.
3 That goes for many of the items he talks about here. He
4 could have simply sent a letter explaining what his
5 position is. The difficulty with trying to negotiate
6 with Mr. Hill on these meet and confers is, I hate to
7 say it, he's been completely and totally unyielding. He
8 only goes one way. There is never a compromise that
9 he's willing to make that we've been able to accomplish,
10 and that's why we're here today. And it really is
11 painful to hear him say that we haven't entered into
12 attempts to meet and confer. They've been the most
13 frustrating experiences I've ever had.

14 I agree that there are certain things here that
15 are difficult to produce, that require a lot of work,
16 but this is a big big case, and I need to emphasize
17 these defendants are asking the Court to vacate a
18 judgment that's been in place for years and years and
19 years.

20 By the way, he says that -- I think it's like the
21 essence of his argument, this is exemplary of what he
22 says, why do we need the transfers from the PIF to the
23 PA? Well, we only have some. Why do we need them?
24 Well, one thing is, Judge Lagueux, within the last
25 couple of weeks, said that if we could display that

1 money was being drained out of the PIF, that he would
2 consider entering a permanent injunction at the hearing.
3 That's why we need it. I don't even know how to
4 respond. I'm at a loss to say, well, you have some of
5 the information, why do you need the rest. How big a
6 deal is it to get the information of the transfers from
7 the PIF to the PA. They ought to be in one single
8 place. There's got to be accounts. He says we already
9 have the PIF articles, why are we asking for the
10 articles? Well, the reason we're asking for the
11 articles is I know from my experience with Mr. Hill that
12 at the hearing in January, if we attempt to introduce
13 the articles that we have, he's going to say who
14 authenticates those? Where did those come from? I
15 don't agree those are the articles. And that's why I
16 want them. I want them to produce them so I can say at
17 the hearing these are the articles, your Honor. They
18 were produced by the defendants. He says, well, why
19 don't we get them from the PIF? He has them. Your
20 Honor has seen the letter from the president of the PA,
21 Mohammad Abbas, where he wrote to Condoleezza Rice in
22 November of 2006 where he said that the PIF, the PIF is
23 under, I quote, the supervision of his office, the PLO
24 president's office. They have these record. So to
25 chase us somewhere else, it's just typical of

1 everything, the frustration that we've had. What
2 they've done is they produced, I would say, more than
3 10,000 pages of pleadings from American cases that are
4 readily available to us, and probably 30 pages of real
5 documents out of all the things we've asked for in the
6 past. I ask your Honor to please look at these
7 requests. Some of them are broad, I admit it, but I
8 don't think they're excessively broad. For example, the
9 proceedings in the Israeli courts during the period of
10 time that they were claiming they didn't know how to
11 defend these cases, we would like to be able to show
12 they had a structure in place. They had represented to
13 the circuit court and to this Court that they were an
14 immature organization with no organized structure in
15 place to handle these. We would like to attempt to show
16 that that's not true, and the Israeli documents are
17 going to be very important in that regard. Now my
18 brother says, well, we have some of them from a witness
19 who we may use. Indeed, that's the fact witness that we
20 may or may not use, Roland Roth. Yes, he has some of
21 those documents. What we'd like to show the Judge in
22 January that there's hundreds of these things, and
23 they're readily available to them.

24 Then he says, for example, we already have the
25 affidavit, very specific affidavit. We've identified

1 it. So clearly we must have it. Yes, we do have it,
2 but I don't want to be confronted in January with an
3 argument what is this thing? Where did it come from?
4 And who's authenticated it? So we asked them to produce
5 it. It's an affidavit they gave to an Israeli court.

6 Your Honor, the deponents that were ordered to
7 come here, that's the last, the fourteens, that's those
8 people that we're talking about, the ones that were
9 ordered to come, and I believe out of the ones that were
10 ordered, I believe they're now all dead with the
11 exception of Dahaln, and so we think we're entitled to
12 get the information we ask for under these very unusual
13 circumstances. I know --

14 And let me say one further thing about the fact
15 that we didn't include all of these requests within the
16 body of our memo. I don't even know how to respond to
17 that. We attached the next exhibit. It would have made
18 the memo a hundred pages long. So, yes, your Honor has
19 to go to the exhibits to see what we're referring to,
20 but that's the kind of objection we've been confronted
21 with.

22 I respectfully ask your Honor to, I know how
23 meticulous you've been in this case, to look at our
24 requests, and to look at them in a fashion not to strain
25 reason, to make them utterly unreasonable on their face,

1 which is what my brother does. It just seems we're not
2 capable of making a request that he is not equally
3 capable of making it seem like we're completely out of
4 balance in what we're asking for. We tried to be
5 restrictive as much as possible in the spirit of what
6 your Honor ordered, and I respectfully ask your Honor to
7 go down the list of things we asked for and
8 independently decide which is relevant and which not.

9 I do admit, by the way, there were a couple of
10 mistakes we made. We did ask for something twice. We
11 shouldn't have. And there were some other mistakes we
12 had, but this is all part of what we've been confronted
13 with in this brief period where we really are, I used
14 the word before, scurrying, and I'll repeat it,
15 scurrying around trying to keep up with what's been
16 going on here. Thank you, your Honor.

17 THE COURT: Thank you, Mr. Wistow. Mr. Hill,
18 with regard to Mr. Wistow's point that as to documents
19 that you say they already have, the reason he wants
20 defendants to produce them is so to avoid objection from
21 you at the hearing in January that the copy they're
22 offering is not authentic or questionable, would you
23 respond to that part of the argument?

24 MR. HILL: Judge, I wish I heard this before
25 today. There has been an occasion where there was an

1 issue about whether an email that one of my partners,
2 Charles MacAleer, who happens to be here today, had sent
3 in another case. It was an authentic email, and I think
4 it was Mr. Strachman who emailed me and said is this an
5 authentic email that Mr. MacAleer sent? And I emailed
6 him back and said, yes. So, I mean, these can be
7 resolved through a stipulation about authenticity. I've
8 instead got a document request that doesn't ask for me
9 to agree that these are authentic copies of the articles
10 of association. It asks me to produce all documents
11 related to the articles of association. That's my point
12 about burden. There's been no effort to confer and
13 reach reasonable resolutions to these things.

14 Your Honor, while I'm here, I'd note two other
15 things just in response to Mr. Wistow, if your Honor
16 will permit me. On the issue of Mr. Al Hindi's death, I
17 think it's apparent that the plaintiffs did know he was
18 dead. If you look at their request number 14, there are
19 four sets of parallel requests of five inquiries, the
20 last one of which is always give me the person's current
21 work and home address. They deleted that for
22 Mr. Al Hindi, so I believe they did know he was dead.
23 I'm not in a position to say for sure.

24 And on the topic of deaths, my understanding is
25 that the list with Mr. Dahaln, Tirawi and Rajub are

1 alive, last I knew. That's all I have, your Honor.

2 THE COURT: And those are three individuals that
3 were sought to be deposed back in 2004?

4 MR. HILL: That's correct, and one of them is on
5 our witness list and we anticipate he will testify live
6 in January.

7 THE COURT: All right, thank you, Mr. Hill. All
8 right, I'll take the second motion under advisement. We
9 will proceed now to the third motion scheduled for
10 hearing, that is document 604 which is plaintiffs'
11 judgment creditors motion for protective order, and
12 order quashing deposition notices, or alternatively for
13 an order of preclusion.

14 MR. WISTOW: Thank you, your Honor.

15 THE COURT: All right, Mr. Wistow, I'll hear you
16 on the third motion.

17 MR. WISTOW: Your Honor has already heard perhaps
18 too much that we were supplied with a list of expert
19 witnesses on October 15th, six and a half years after
20 the judgment was entered in this case. We responded.
21 We provided the experts within 30 days following that
22 October 15th, really in an excess of caution, and
23 maintaining expressly when we produced the experts
24 reports that we did not believe that Rule 26 applied.
25 We expressly said that. But we didn't want to run the

1 risk that a court might disagree with us and so we came
2 up with those things.

3 We've decided that from our perspective, we did
4 not wish to take depositions of the other side, even
5 30(b)(6) depositions, although at first we intended to
6 do it. The various reasons for that, some of them
7 involve our work product and our strategy, but I can say
8 that one of the reasons was so that we were not
9 confronted with the argument that we were required to
10 produce experts because we had taken certain positions.
11 That's a minor issue in the thing. Basically we made a
12 decision, it's common in Rhode Island, not to take
13 expert depositions in the other side. For example, many
14 lawyers who do medical malpractice cases in Rhode
15 Island, many of them do not do expert depositions, many
16 of them do, depending on the case. We decided in this
17 case not to do this.

18 In any event, after we supplied the names of our
19 experts, which we contend we did really pursuant to
20 interrogatory questions and not 26, we were given a slew
21 of notices to depose our experts, many of which were
22 literally on the same day and at the same time, and we
23 moved for a protective order, and really the basis for
24 the protective order is quite simple, it's that Rule
25 26(a)(2), which is the only rule that provides for the

1 taking of deposition of experts, specifically talks
2 about experts who are going to be used at trial. It
3 uses the term trial, and that is not a simply technical
4 position we're taking. Wright & Miller in Federal
5 Practice and Procedure, Section 2031.1 says Rule
6 26(a)(2) does not apply to hearings on motions, and
7 26(a)(2), of course, is the provision for taking
8 depositions of experts. And, in fact, Wright & Miller
9 says, and I quote: The disclosure requirement is keyed
10 to trial, unquote, and may not apply to use of experts
11 in various pretrial or nontrial activities. Citing a
12 case UAW vs General Motors Corporation, Eastern District
13 of Michigan, which was affirmed by the Sixth Circuit.

14 Now, if you take a look, your Honor, at Rule 33,
15 which relates to interrogatories, it makes no such
16 restriction about using interrogatories only for trials.
17 Similarly, for Rule 34, which is request for production
18 of documents. Same thing for Rule 35, which is physical
19 or mental examination. Same thing for Rule 36, for
20 request for admissions. All of those, if you look at
21 them separately, talk about using interrogatories,
22 document requests, requests for physical exams, really
23 in any kind of actions. The only rule that talks about
24 use at trial is Rule 26. And by the way, the reason for
25 that may well be because for many many years after the

1 rules were promulgated you could not take the deposition
2 of an expert at all, and obviously that rule changed, I
3 believe, quite a long time ago, 1970, but when it
4 changed, and it allowed the taking of depositions, it
5 was very clear that it was intended to be for those
6 experts who were going to testify at trial.

7 Now, my brothers have cited some cases in their
8 opposition to our motion for protective order, which are
9 completely beside the point. In two of the cases where
10 the parties were sanctioned, it was because the lawyers
11 for the adversary had represented and agreed to produce
12 certain people and then didn't. Indeed, two of their
13 cases don't even involve experts at all. Their failure
14 to produce employees at deposition. There's no question
15 that -- I'm not suggesting, by the way, that we don't
16 control the experts to a certain extent. I would not
17 insult the Court's intelligence by that. What I am
18 saying is we have a right to say that the discovery here
19 has to be in accordance with the rules. Judge Lagueux
20 did not in any way, shape or form, change that. He said
21 there would be discovery in the case, and discovery
22 would close on a certain day, and we're ready, willing
23 and able to abide by that, but we also think that the
24 rule regarding experts, I'll read it to the Court, it's
25 facially directly on point: A party may depose any

1 person who has been identified as an expert whose
2 opinion may be presented at trial, and it's not a flight
3 of fancy that I'm alluding to. I quoted you from Wright
4 & Miller where they make that distinction between trial
5 and hearing.

6 I would also again ask your Honor to take a look
7 at the language of when you can ask interrogatories,
8 when you can do document requests, when you can do
9 physical exams, when you can do requests for admissions,
10 and your Honor will see that the rules make a
11 distinction.

12 In any event, we voluntarily produced also
13 reports of experts we're going to use to testify on
14 legal matters, straight legal matters, Israeli law, and
15 under Rule 44.1, it's our position we didn't even have
16 an obligation to produce reports at all on those issues,
17 and it's a fortiori as to those witnesses.

18 THE COURT: I'm sorry, Mr. Wistow, I'm not sure
19 I'm catching the distinction. You're talking about
20 those witnesses being different from the other
21 witnesses. Tell me about the two groups of witnesses
22 you're drawing a distinction between.

23 MR. WISTOW: Okay. Expert witnesses who are
24 going to testify about matters of Israeli law versus
25 other experts who will testify, for example, about the

1 connection between Hamas and the PLO and the PA, and the
2 cooperation between them. That's the distinction I'm
3 drawing, and that distinction is embodied in, I believe,
4 in Rule 44.1 where we simply, if we wished, could submit
5 just plain old affidavits to the Court at the time of
6 hearing, without even producing the expert. The reason
7 for that, your Honor, is that -- I'll just read briefly
8 from the rule: A party who intends to raise an issue
9 about a foreign country's law must give notice by a
10 pleading or other writing. In determining foreign law,
11 the Court may consider any relevant material or source,
12 including testimony whether or not submitted by a party
13 or admissible under the Federal Rules of Evidence. The
14 Court's determination must be treated as a ruling on a
15 question of law. So there is a distinction. I don't
16 want to burden the Court with making too big a deal out
17 of the distinction. I think it puts an a fortiori spin
18 to the experts on foreign law, but I don't think that's
19 a sufficiently significant point to burden the Court
20 with asking a distinction be made.

21 I want to point out one other thing, your Honor,
22 the rules really do recognize the difference between a
23 trial and motions. For example, Rule 43 says -- it's
24 entitled Taking Testimony, and it starts off: (A) in
25 open court, at trial, at trial, the witness's testimony

1 must be taken in open court unless a federal statute,
2 the Federal Rules of Evidence, these rules or other
3 rules adopted by the Supreme Court provides otherwise,
4 and it goes on. It talks about at trial.

5 Then, (c), evidence on a motion, when a motion
6 was, in fact, outside the record, the Court may hear the
7 matter on affidavits or may it wholly or partly on oral
8 testimony or on depositions. The rules make a
9 distinction between a trial and a motion, and while
10 there's going to be a hearing with evidentiary aspects
11 of it, to it, rather, it still remains a motion, a
12 motion to vacate the judgment, and under the rules,
13 specifically Rule 43, you may have a motion where there
14 is evidence taken, it's still a motion. It's not a
15 trial. And we take the position, your Honor, that we
16 have no obligation to produce these experts, and indeed
17 the rules don't allow for it and we'd ask for a
18 protective order in that regard. We didn't take the
19 extreme position of just refusing to do it. We're not
20 going to act at our peril when the matter is serious.
21 Having said all that, we ask the Court to agree with us
22 that we're under no obligation to produce expert
23 witnesses.

24 THE COURT: Thank you, Mr. Wistow. Mr. Hill.

25 MR. HILL: Your Honor, I'm confident this one

1 won't take as long as the last one.

2 Let me start with again a big picture comment
3 which is that this has, to a certain extent, been
4 overtaken by the close of discovery. As a practical
5 matter now we can't take the depositions because
6 discovery closed on November 19th. On November 29th, in
7 accordance with the Court's deadline for motions, we did
8 file a motion to exclude the testimony of any of the
9 witnesses, the expert witnesses, that the plaintiffs
10 have identified but did not make available for
11 depositions. So, just to be clear, the relief we want
12 from the inability, from the failure of the plaintiffs
13 to produce the witnesses for deposition is that they
14 will not be allowed to testify at the hearing, and
15 that's consistent with the general equitable Rule 37
16 principles that if you don't make discovery available
17 you can't rely on it at the hearing.

18 Then let me make this big picture comment. So
19 we're reduced to arguing about the meaning of Rule 26(b)
20 --

21 THE COURT: Let me ask you a question, Mr. Hill.

22 MR. HILL: Yes, sir.

23 THE COURT: If I grant your motion, does that
24 mean you do not intend to take the depositions but
25 simply would perhaps take my order and show it to Judge

1 Lagueux and say, Judge, you should exclude, grant my
2 motion to exclude the testimony because Judge Martin
3 found that the plaintiffs wrongly failed to produce
4 these witnesses for deposition. You don't intend to try
5 to actually depose these people at this point.

6 MR. HILL: Well, it does depend on your Honor's
7 ruling, and that's a good point that I should make. So
8 it's not my motion, it's their motion, so I'd ask you to
9 deny the motion under any circumstances, but --

10 THE COURT: Okay, thank you. You're right on
11 that point, Mr. Hill. It's their motion, they're
12 seeking a protective order. If I deny the motion for
13 protective order, I'm asking you, do you intend to
14 depose these people or are you simply going to take the
15 ruling and use it as support for your other motion?

16 MR. HILL: Yeah. What I would ask the Court to
17 do is deny the motion, and if Judge Lagueux grants the
18 motion to exclude, obviously I'm quite happy. These
19 people are not going to testify at the hearing, which I
20 think is a fair result. If on the other hand Judge
21 Lagueux is going to deny the motion to exclude and these
22 people are going to be allowed to testify at the hearing
23 in January, I will want them to be produced so I can
24 examine them beforehand. And let me just give your
25 Honor an example of why. Mr. Wistow related the

1 depositions that have been taken in this case, and as it
2 turns out, over the 5 and a half month discovery period
3 only 2 depositions were taken, the deposition of the
4 prime minister which the plaintiffs noticed, and a
5 deposition of one of these seven experts, which the
6 plaintiffs noticed, and so what's going on here is when
7 I want to take a deposition of people that are going to
8 testify at the hearing, the plaintiffs say, I'm sorry,
9 you're not entitled to do it, but when they want to take
10 a deposition of somebody who's going to testify at the
11 hearing, they voluntarily produce this person, and of
12 course we attend it because we got the notice that we
13 had to do so, and I think this goes more to the motion
14 to exclude, but this shows why we wanted the
15 depositions. We learned among other things at this
16 deposition of this expert, Offir Saad, that Mr. Saad had
17 not written his own report, that it was written by the
18 plaintiff Israeli lawyer and sent to Mr. Saad for his
19 review. He gave him a little feedback. The lawyer made
20 changes and then Mr. Saad signed it. This is
21 secondhand. I wasn't at the deposition. This is what I
22 understand from the people that were there. So that's
23 an example of why we needed to take these depositions,
24 and I think the overall equitable point is that if these
25 people are going to appear at a hearing, we should have

1 had an opportunity in discovery to take their
2 depositions. Now I realize they were disclosed
3 relatively late with only a week left, that's why they
4 got notice for the last week of deposition. Some double
5 tracking was necessary when you have seven witnesses and
6 only five business days to do them in, and some less
7 because we got some of the reports on Monday the 15th,
8 and discovery closed on Friday the 19th. So we were
9 trying to avoid the prejudice of not having an
10 opportunity to examine the people before the hearing.
11 That's why we noticed the depositions in the fashion
12 that we did. So why don't we go into the main event, I
13 guess, of which is are we entitled to it, and --

14 THE COURT: You noticed these depositions were in
15 the United States, correct?

16 MR. HILL: Well, actually I noticed some in
17 Israel because the history of this, Judge, is that at
18 the October 25th hearing when we were all here in the
19 courtroom, we came in that morning, and we were given
20 deposition notices by the plaintiffs that morning, and
21 four of those were for expert witnesses, we didn't even
22 have reports at that point in time, that the plaintiffs
23 had noticed to take depositions of in Israel.
24 Subsequently, they decided they didn't want to take
25 depositions of three of those people, they only wanted

1 to take the deposition of Mr. Saad, which actually
2 happened last Wednesday, the 1st, by agreement of the
3 parties. So when they withdrew the notices for the
4 other three, we issued notices for those three people in
5 Israel, and the plaintiffs said they're not going to
6 show up, and then on the 12th, I got a list of six
7 additional witnesses, not reports. I only got one
8 report on the 12th. Six additional witnesses, two of
9 which are located, as I understand it, in Providence,
10 and I noticed their depositions for here in Providence,
11 and four of which, I'm not quite sure of everyone's
12 location, I think two are located in Washington. I
13 noticed their depositions in Washington. And the last
14 two, I wasn't quite sure where they were because the
15 plaintiffs didn't tell me their addresses. I noticed
16 them for Washington. So, from my perspective, you know,
17 I'm being told a week before discovery closes, here are
18 six additional expert witnesses, and we're just trying
19 to cure the prejudice that we're necessarily going to
20 suffer if we can't depose them before the period ends.
21 And the argument that's being made to you now is, as I
22 think Mr. Wistow acknowledged, rather technical, and I
23 think there's a simple explanation for why the rule
24 talks about deposing somebody who is going to testify at
25 trial, and it is the following. You know, 26(b)(4)(A)

1 and (B) distinguishes between two types of experts, as
2 your Honor is undoubtedly aware. There are 26(b)(4)(A)
3 experts, experts who may testify, and 26(b)(4)(B)
4 experts, experts employed only for trial preparation.
5 These are typically thought of as the consulting expert
6 versus the testifying expert. And now it is true that
7 the language of 26(b)(4)(A) says a party may depose any
8 person who has been identified as an expert whose
9 opinions may be presented at trial. This is in contrast
10 to 26(b)(4)(B) which says ordinarily a party may not by
11 interrogatories or deposition discover facts known or
12 opinions held by an expert who has been retained
13 especially employed by another party in anticipation of
14 litigation or to prepare for trial and who is not
15 expected to be called as a witness at trial. So I would
16 submit that the distinction in 26(b)(4)(A) about trial
17 is not about trial versus hearing, it's about testifying
18 at trial versus testifying in anticipation of trial. So
19 I don't think you can read over much into the use of the
20 word trial in 26(b)(4)(A).

21 But let me make the bigger point which is this,
22 if the plaintiffs are right, Judge Lagueux entered an
23 order in June pursuant to Rule 16 saying all discovery
24 had to be concluded by November 19, 2010. If he is
25 right, if the plaintiffs are right, that means that we

1 will be going to a hearing in January where we will be
2 cross-examining, I guess six, because they noticed one
3 of the seven for themselves, six people that we never
4 had an opportunity to depose during the discovery
5 period, and the plaintiffs' position appears to be that,
6 well, because that's a motion, that's fine, and I
7 respectfully submit that's not what Judge Lagueux had in
8 mind. I mean, this hearing in January may not be a
9 trial in the sense of, you know, a typical jury trial,
10 but it's very much like a trial. He's making factual
11 findings. He's hearing live evidence. If I may, I left
12 something at my desk, your Honor. And I don't know that
13 it's materially distinguishable from any other bench
14 trial that you might have where this would apply. I'm
15 going to quote Mr. Wistow from the November 17, 2010
16 hearing before Judge Lagueux. This is on page 5 of the
17 transcript at line 15: Your Honor, let me express my
18 concern about the issue. We're down for trial January
19 18th, as your Honor knows, on the motion to vacate. So,
20 I mean, you know, this technicality about whether this
21 is a trial versus a hearing is really pushing a
22 technical point here. We're going to have an
23 adversarial hearing in January where Judge Lagueux is
24 expecting to hear live testimony, and make findings of
25 fact, based on that testimony and the documents that are

1 admitted into evidence, and the plaintiffs are asking
2 your Honor to rule that because 26 uses the word trial,
3 it means that they don't have to produce their experts
4 for deposition unless, of course, they want to depose
5 their own experts, which heightens the unfairness of
6 what's going on here.

7 I'll also note that we separately moved on the
8 29th to exclude these witnesses on Daubert grounds, and
9 for a number of them we had a hard time coming up with
10 our Daubert grounds because we couldn't examine them.
11 The typical discovery process is you get a disclosure
12 from a witness, an expert witness, and then you can
13 examine them, and then you can file your Daubert motion,
14 and the Court can perform its gatekeeper function of
15 determining whether this is relevant and reliable and
16 otherwise admissible. All of that has been truncated
17 here because the plaintiffs waited until the end to
18 produce their reports and then wouldn't make the people
19 available for deposition. So I'd respectfully submit
20 that a motion for protective order is not justified.

21 Let me make a point about Rule 30 which is
22 different than Rule 26, of course. Rule 30(a)(1) says a
23 party may, by oral questions, depose any person,
24 including a party without leave of court except as
25 provided in Rule 30(a)(2) which doesn't apply. The

1 deponent's attendance may be complied by subpoena under
2 Rule 45. And, Mr. Wistow is right, I do not have a case
3 that says a party has to produce an expert under Rule 30
4 for deposition because you typically do it under Rule
5 26(b)(4)(A), and there's no dispute about that. But the
6 fact of the matter is, these are people that the
7 plaintiffs are paying to give testimony. They're
8 clearly within their control. They say as much in their
9 opening brief, or they say if your Honor orders them to
10 produce them, they will. So these are not people that
11 the plaintiffs could not have produced for deposition.
12 These are plaintiffs (sic) that the people (sic) didn't
13 want to produce for a deposition, and I think
14 unfortunately, as Mr. Wistow was explaining part of the
15 rationale, he was suggesting that he didn't take our
16 experts in part because they wanted to maintain this
17 position. That's not what civil discovery is suppose to
18 be about. The parties are suppose to make disclosures.
19 They're suppose to discover the facts before you get to
20 the trial or evidentiary hearing, or how you might
21 characterize January's proceedings, and that helps the
22 Court, because the Court is not then faced with us doing
23 an exploratory cross-examination. The Court's got a
24 real cross-examination because we've already done a
25 deposition, and so for those reasons I would ask that

1 the Court deny the motion for protective order.

2 There is a cross-motion which I don't think
3 Mr. Wistow mentioned seeking to exclude all evidence
4 from us. I don't know how seriously this is pressed,
5 but I mean I'll just make the point that under Rule 37
6 in order to exclude evidence from the defendants for
7 failure to provide initial disclosures there would have
8 to be some prejudice to the plaintiffs. There is none
9 here. They sent us interrogatories saying who your
10 witnesses are. We answered them. We supplemented them.
11 They asked us what our exhibits were. We produced them.
12 So there's no prejudice that would merit some preclusive
13 sanction against the defendants.

14 THE COURT: The cross-motion is not before me.

15 MR. HILL: The cross-motion is not before you,
16 okay. Well, then you don't need to --

17 THE COURT: Not this afternoon, certainly,
18 Mr. Hill.

19 MR. HILL: Then you don't need to have me talk
20 about that. Thank you, your Honor.

21 MR. WISTOW: I'll be very brief, your Honor.

22 THE COURT: All right, Mr. Wistow.

23 MR. WISTOW: Actually, the motion for protective
24 order asks alternatively, if the Court believes that
25 Rule 26 applies, that there be a preclusion against the

1 defendants in this case because they did not produce the
2 --

3 THE COURT: That's included within the motion.

4 MR. WISTOW: It is within the motion.

5 THE COURT: All right, thank you for alerting me
6 to that fact.

7 MR. WISTOW: And, by the way, my brother says
8 there's no prejudice because they supplied all this
9 information. He said that within a minute or two after
10 commenting that we waited until "the last minute" to
11 give our experts. I would remind the Court, we got
12 their expert reports October 15th. They've been adding
13 witnesses through, I told you, most recently November
14 11th. They didn't make the initial disclosures. I'm
15 not saying they have to. I'm saying if Rule 26 applies,
16 then it applies for them, also. It's staggering to me,
17 your Honor, to hear Mr. Hill say that I'm being
18 technical. If anybody is being technical in this case,
19 in a million places, it's Mr. Hill, and he's entitled to
20 be technical. I'm entitled to be technical, also. We
21 didn't -- and, by the way, I misspoke that day when we
22 were in front of Judge Lagueux, we were there on a
23 preliminary injunction hearing, and I used the term
24 "trial" once, and I misspoke. We were very careful,
25 always in writing, to take the position that our

1 disclosures were not intended to be under 26(a). That
2 cannot be (inaudible). So if I'm going to be punished
3 for that error that day, I think that that's a bit much.
4 The depo that we did take of Saad, one of our experts,
5 was a de bene esse depo. It was not a discovery depo.
6 We're not taking depositions of our own experts for
7 discovery purposes. We did it because Mr. Saad cannot
8 be in the hearing in January, cannot, so we felt his
9 testimony was important, and we took his depo for that
10 reason. It was not a discovery depo.

11 By the way, the statement that's made, I wasn't
12 present at the hearing in the deposition, either, but my
13 understanding of how the report of Mr. Saad was
14 generated was contrary to what Mr. Hill says. Mr. Saad,
15 who is not a fluent English speaker, he speaks English,
16 he told an Israeli attorney what to put in the affidavit
17 specifically. That Israeli attorney did so, sent it to
18 Mr. Saad. Mr. Saad made changes in the English because
19 he has a good enough English to understand what it says,
20 although he prefers not to write it in the first
21 instance. He did make changes and then confirmed under
22 oath that the affidavit, excuse me, the report,
23 represented his honest beliefs. So I think it's totally
24 unfair to make the suggestion that Mr. Hill did. And I
25 stand on what I said, your Honor. We filed in good

1 faith a motion for protective order. We're not trying
2 to delay anything. We're the first to recognize that if
3 we're wrong about our interpretation of the law, your
4 Honor will say so and we'll do the best we can to remedy
5 it. But we were not trying to pull any fast ones about
6 giving this information at the last -- that is so
7 painfully here, Judge. We get all of those expert
8 reports on October 15th. We give everything back to
9 them, and you've seen what those reports look like,
10 within 30 days, and they say we waited until the last
11 minute. On the contrary, we believe that the dates on
12 their expert reports are all October 15th. The day they
13 were submitted indicates that they told their experts to
14 hold off giving the reports. Thank you, your Honor.

15 THE COURT: All right, thank you, Mr. Wistow.
16 I'll take these matters under advisement. I'll issue
17 written rulings. I intend to work on this immediately.
18 I recognize these matters are pressing. Because they're
19 pressing, my ruling will be similar to the previous
20 orders I've issued, which means they'll be relatively
21 brief. I'll try to put forth my reasons for ruling as I
22 do, and I'll try to get them out promptly. If the
23 plaintiffs are able to submit those documents this
24 afternoon, do so. If they're not, Monday is acceptable,
25 Mr. Strachman. I'm referring to the in camera review.

1 All right, this will conclude the hearing. The Court
2 will be in recess.

3 (RECESS)
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7

8 C E R T I F I C A T I O N

9 I, court approved transcriber, certify that the
10 foregoing is a correct transcript from the official
11 electronic sound recording of the proceedings in the
12 above-entitled matter.
13
14

15 /sJOSEPH A. FONTES/

16 COURT REPORTER

17 DECEMBER 9, 2010

18 DATE
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